UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE LARRY R. HICKS, DISTRICT JUDGE

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation,

Plaintiffs,

vs.

RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual,

Defendants.

No. 2:10-cv-0106-LRH-VCF

TRANSCRIPT OF MOTION HEARING

May 25, 2016

Reno, Nevada

Court Reporter: Donna Davidson, RDR, CRR, CCR 318
Certified Realtime Reporter
400 South Virginia Street
Reno, Nevada 89501
(775) 329-0132

A P P E A R A N C E S

FOR THE PLAINTIFFS:

BOIES, SCHILLER & FLEXNER LLP
RICHARD J. POCKER
300 South Fourth Street, Suite 800
Las Vegas, Nevada 89101
(702) 382-7300
Fax: (702) 382-2755
rpocker@bsfllp.com

MORGAN LEWIS & BOCKIUS LLP
THOMAS S. HIXSON
NITIN JINDAL
JOHN A. POLITO
One Market, Spear Street Tower
San Francisco, California 94105
(415) 442-1000
Fax: (415) 442-1001
thomas.hixson@morganlewis.com
nitin.jindal@morganlewis.com
john.polito@morganlewis.com

JAMES C. MAROULIS
Oracle Corporation
500 Oracle Parkway
Redwood City, California 94070
(650) 506-4846
jim.maroulis@oracle.com

FOR THE DEFENDANTS:

GIBSON, DUNN & CRUTCHER LLP
MARK A. PERRY
1050 Connecticut Avenue N.W.
Washington, DC 20036-5306
(202) 955-8500
mperry@gibsondunn.com

GIBSON, DUNN & CRUTCHER LLP
JOSEPH A. GORMAN
555 Mission Street
San Francisco, California 94105
(415) 393-8296
jgorman@gibsondunn.com

A P P E A R A N C E S (Continued)

FOR THE DEFENDANTS:

GIBSON DUNN & CRUTCHER LLP
BLAINE H. EVANSON
333 South Grand Avenue
47th Floor
Los Angeles, California 90071
(213) 229-7000
bevanson@gibsondunn.com

SHOOK, HARDY & BACON LLP
PETER E. STRAND
2555 Grand Boulevard
Kansas City, Missouri 64108
(816) 474-6550
Fax: (816) 421-5547
pstrand@shb.com

LEWIS ROCA ROTHGERBER CHRISTIE LLP
W. WEST ALLEN
DANIEL F. POLSENBERG
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8230
Fax: (702) 949-8364
wallen@lrrlaw.com
dpolsenberg@lrrc.com

DANIEL B. WINSLOW
RIMINI STREET, INC.
6601 Koll Center Parkway
Suite 300
Pleasanton, California 94566
(925) 264-7736
DWinslow@riministreet.com

JOHN P. REILLY
RIMINI STREET, INC.
3993 Howard Hughes Parkway
Suite 500
Las Vegas, Nevada 89169
(336) 908-6961
JReilly@riministreet.com

RENO, NEVADA, MAY 25, 2016, 10:02 A.M.

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P R O C E E D I N G S

THE COURT: Good morning. Have a seat, please.

I haven't seen this many suits in the courtroom since last October.

COURTROOM ADMINISTRATOR: Today is the date and time for hearing regarding plaintiffs' motion for attorneys' fees, number 917, and motion for preliminary injunction, number 900, in civil case 2:10-cv-106-LRH-VCF, Oracle USA, Inc., and others, versus Rimini Street, Inc., and others.

Counsel, if you could please state your appearances for the record.

MR. HIXSON: Good morning, Your Honor. Tom Hixson, John Polito, and Nitin Jindal, with Morgan Lewis, for Oracle.

THE COURT: Thank you.

MR. MAROULIS: Good morning, Your Honor --

MR. POLSENBERG: Good morning, Your Honor, Dan Polsenberg for defendants. And if I may, I'd like to introduce --

THE COURT: Just a second, Mr. Polsenberg.

MR. POLSENBERG: I'm sorry. I thought Tom

covered everybody.

MR. MAROULIS: Good morning, Your Honor. James Maroulis for plaintiffs.

THE COURT: Thank you.

MR. MAROULIS: From Oracle.

MR. POCKER: Your Honor, Richard Pocker, Boies, Schiller and Flexner, also on behalf of plaintiffs.

THE COURT: All right.

See, Mr. Polsenberg, you have to get used to this crowd.

MR. POLSENBERG: Really. More than at a state bar meeting. And most of them pro hoc.

Dan Polsenberg, Your Honor. And if I could introduce three Gibson, Dunn and Crutcher lawyers. I have Mark Perry, from Washington, DC, who will be arguing the injunction motion; Blane Evanson, from California, who will be arguing the attorneys' fees motion; and assisting them is Joe Gorman, also from California.

THE COURT: All right. Thank you.

MR. POLSENBERG: Thank you.

THE COURT: Welcome to all of you in the courtroom. I do appreciate having you here. I appreciate the obvious interest on both sides.

And I'll tell you up front, I appreciate the quality of the briefing in this matter and compliment you

on it. I consider it professional and well done. And it's a pleasure to have you back in the courtroom.

We had earlier entered a minute order indicating that argument for both sides should not exceed 45 minutes on the respective motions. That's not to say they necessarily should go 45 minutes, but I certainly would allow you that amount of time and for Plaintiff Oracle to divide it between opening and reply argument as necessary.

So all of that stated, Mr. Hixson, are you carrying the laboring oar here?

MR. HIXSON: I'll be arguing the permanent injunction motion, and Mr. Pocker will be arguing the attorneys' fees motion.

If Your Honor has a preference, we will argue them in the order the Court prefers, otherwise we --

THE COURT: We have been treating them with A, for attorneys' fees, first. So let's go with that.

Mr. Pocker?

MR. POCKER: Good morning, Your Honor.

As the Court has noted, this case has been -- this issue, rather, the attorneys' fees issue, has been extensively briefed. I think there's 700 to 1,100 pages of declarations and documentation regarding our request and in response.

As a consequence I'm not going to be belaboring

a lot of the evidence that's been submitted. We seek a substantial number or amount of attorneys' fees in this case but one which, when the Court analyzes the law and the facts of this matter and the way this litigation has unfolded, you'll determine that we're entitled to every dollar we've asked.

We have noted throughout our pleadings that this isn't the total amount that we would have been justified in asking for under the law and the facts and the circumstances of this case either.

The defendants primarily oppose our request for attorneys' fees on four grounds. They first cite Section 505 indicating that it is a discretionary statutory provision regarding an award of costs and fees in a copyright case and opine that because there was a finding by the jury that there was not willful infringement by Rimini or Mr. Ravin, that for some reason that would make an award of attorneys' fees in this case an abuse of direction on your part.

Second, they even quarrel with who won this case and who the prevailing party is, despite the overwhelming evidence that Oracle is in fact the winner of the underlying litigation.

Third, they take issue with broad categories of costs that we have asked to be reimbursed and certain

categories of attorney work that we've claimed attorneys' fees for, citing a number of their experts who opine on whether or not these practices are not only compensable but permissible, duplicative. There's a raft of objections that are made in that context.

And they also quarrel with whether or not the lodestar that Oracle has proposed based upon the reasonable rate times the amount of hours actually expended at that rate is in fact permissible given the legal market in Las Vegas.

The Court has heard our arguments -- or has read our arguments. I'd like to address some of what the opponents have said with respect to the prevailing party issue.

The prevailing party issue is important not just for the 505 analysis but also with respect to the arguments that Rimini has made that there should be massive percentage discounts of whatever amounts the Court might be tempted to award in this case based on what they have described as the limited success achieved by Oracle in this litigation.

Sometimes I feel from reading the pleadings in this case that I attended a completely separate trial from the one that the Rimini lawyers attended.

There's no question in this case that a $50

million copyright infringement and a computer access abuse verdict is a substantial win for Oracle, regardless of how much those damages could have been had certain arguments been adopted by the jury.

Just the other day across my desk came a publication about the top 100 verdicts of 2015. This case was number 35, and it had a synopsis in there of all the arguments and all the claims and the results on those, and there was input from attorneys for both sides.

This case wouldn't be number 35 in a journal of top 25, top 100 2015 verdicts if Rimini Street was the prevailing party.

So it's almost ludicrous for them to advance that argument. It's done, of course, because they believe that by demonstrating by any of three metrics they've proposed, such as how many claims were pled versus how many claims Oracle prevailed on, or their second measure, how much money was asked, how much money was awarded by the jury, or their third one had to do with another percentage of success percentage, their argument is that somehow that's how this Court should approach this when determining the ultimate amount of attorneys' fees, that somehow it matters whether or not Oracle wins on every single claim.

But it's just wrong to count up the claims and

say just because we got rid of the accounting claim, just because we did not proceed with the contract claim that somehow Oracle did not succeed in this litigation.

Everybody knows, everybody in this room -- maybe not Mr. Polsenberg, but everybody in this room was at that trial and saw what this case was about. It was a copyright infringement case and a computer abuse case, and Oracle prevailed on both of those claims with damages that totalled over $50 million.

On the infringement claim alone Oracle received an award from that jury that was three and a half times what Rimini's expert claimed the damages were.

And on the computer claim, they received -- we received $14 million, which coincidentally happens to be the same amount that was posed by our expert, Ms. Dean, with respect to the damages in this case.

Every piece of evidence that was presented at that trial came in to demonstrate Rimini Street's infringement or the abuse of Oracle's computer system. The fact that other claims were pled really isn't the appropriate measure of whether or not what was presented at trial actually needed to be presented at trial and whether or not our arguments were accepted.

For Rimini Street to argue that the jury by and large accepted their arguments and thus they prevailed on

more issues than did Oracle is ludicrous on its face. And I do not believe for a minute that they wouldn't gladly switch places with us in the results ultimately that are rendered in this judgment.

The other thing to keep in mind is that much of this case ended even before the jury was seated. We had two hard-fought summary judgment motions with respect to two of the software license -- or copyrights that have been infringed. And on both of those, Oracle won without calling a single witness at trial.

This measures into the ultimate success as well because after those motion for summary judgment rulings there was less to try and less to present to the Court.

Rimini didn't win on the raw numbers of damages either. $50 million is huge for any federal jury. And as the Court has noted during the trial, in a case like this, they don't come around Nevada very often, and an award this -- of this level of damages is unusual.

There's no way that this is not a significant victory for Oracle. We have Rimini's expert, Mr. Hampton, argued for $10 million in copyright damages, and that was based on his theory of how -- with a few more -- hiring a few more people and maybe expanding their work facilities Rimini would have been able to operate the same -- in a noninfringing manner.

Well, the jury rejected that flat out of hand, and, instead, they awarded $35 million.

The computer access statutes. Rimini dismissed those completely and said no damages are entitled there. The jury came back with 14 million. And let's talk about what claims were actually at issue at trial and what their ultimate disposition was.

There were three claims on which Oracle prevailed: Direct copyright infringement against Rimini Street for $35 million and the Nevada and California computer statutes for $14.4 million. Now, arguably, those two are based on the same conduct, and the California and Nevada claims, the damages will be for one of those claims and not the other.

There was one active claim that was not presented to the jury. The California Unfair Competition allegation, which is under Section 17200. That is part of what the Court will be hearing later today, part of the injunction proceedings.

And that's because that's not a jury claim. It is an equitable claim. It's to be decided by this Court.

Two -- only two claims were presented to the jury upon which Oracle did not prevail. And both were varieties of tortious interference claims. One was interference with perspective economic advantage under

Nevada law and one was tortious interference with contract.

It is true that on both of those cases -- both of those claims, the jury ruled against Oracle and did not award damages.

But what was the underlying conduct that was at issue on all of those claims that went before the jury? It was Rimini Street's downloading of Oracle's material violating the computer access statutes, using that to build a business on the cheap, competing with Oracle in the marketplace by infringing their copyrights and violating the licenses -- or the -- without a license and violating the licenses of their customers.

It was all part and parcel of one course of conduct. And as a result, the fact that the jury found them responsible under one theory, copyright infringement, is more than enough to demonstrate that in this particular case Rimini's arguments did not prevail, Oracle's did, and Oracle was the winner.

Much is made of five claims that were originally pled that did not reach the jury. Let's talk about those. The federal Computer Fraud and Abuse Act claim. Oracle did in fact decide not to proceed with that after the settling of the jury instructions, not wanting to confuse the jury.

We had California and Nevada statutes that covered similar, if not identical, conduct. That was more

than sufficient for us to set Rimini's conduct in front of that jury and get the kind of verdict and damages we needed.

Breach of contract. Same thing. It had to do with the breach of the terms of use of Oracle's website. Under the circumstances it wasn't necessary to proceed to proceed to -- to pursue the same damages.

Trespass to chattels. That was abandoned. But that's, again, premised upon trespassing on the computer systems which were more than adequately addressed by the other claims.

Unjust enrichment. Of course, it would be -- never go to the jury because it's reserved as an equitable remedy and the situation in which a jury may find against Oracle that Oracle would be entitled to pursue an unjust enrichment equitable claim. So of course that was abandoned. It wasn't necessary, given the fact that Oracle won substantial damages.

And, lastly, the accounting claim, which is pled in almost every case of this magnitude as an additional equitable remedy, which might come in handy if there did become a question during the proof as to what the scope of the damages or economic underpinnings of those damages were.

As Magistrate Judge Cooke opined in one of the

many cases cited by the defendants in this particular case, the plaintiff is the captain of its complaint.

And in this particular case Oracle was free to clean it up a little bit before it went to the jury. That doesn't mean that any of these five claims were for some reason definitively decided against them. And in that context the fact that they did not proceed to the jury means nothing at all.

Also with respect to this issue of who really won this case, let's talk about Rimini's counterclaims. Early on in this case they had a counterclaim for defamation. They were offended that Oracle had made statements to the effect that Rimini had engaged in massive downloading of its software and accusing it -- it's -- the Rimini Street claim said, of criminal conduct. They lost that. They lost that on summary judgment.

The declaration of copyright misuse was pled as a defense in this case. They lost that on a motion to dismiss. Yet they continue to try to argue it in the context of this case, despite the fact that it really hasn't been a part of this case since many, many months before trial began. And they also had a California Unfair Competition claim of their own under 17200. That was defeated on a motion to dismiss.

They also abandoned or lost 11 affirmative

defenses. And those affirmative defenses were rejected by the jury.

Those included such things as consent, implied license, actual license, the doctrine of merger, fair use, statutes of limitations. All of these were advanced by Rimini Street, allegedly in good faith, none of which succeeded at trial.

So if we're going to get into this balancing of the claims and who won what, all of that needs to be taken into consideration as well.

Rimini has made much of this notion of what they continually call innocent infringement. And I think in our reply we pointed out how many times the word innocent keeps popping up in their papers on this issue.

But we need to keep in mind exactly what this whole concept is about. First of all, Section 505 does not condition an award of fees on a showing of a willful infringement by a defendant. And that's the *Casella versus Morris* case. We've cited it. There's been no change to that.

We don't have to show willful infringement to be entitled under Section 505 to an award of attorneys' fees and costs. The whole notion of innocent versus willful infringement only comes into play with statutory damages in the copyright framework. And that is they were asked --

the jury was asked, for an advisory ruling on whether -- or advisory opinion as to whether or not they thought the infringement was willful or innocent.

It comes into play only with respect to what -- a situation in which Oracle would choose its statutory damages as its award over its actual damages and that the finding of willful would have allowed those statutory penalties to increase.

In this particular case it never really even came into play. Because the jury returned a calculation of $2.79 million in statutory damages. With a willfulness enhancement, it would have only gone up to 2.9. But in reality the actual damages, the award by the jury which Oracle is accepting, is $35 million. So it never had any play in this case whatsoever.

What Rimini Street wants to do with it is say you can infer from this finding on this advisory issue that somehow the jury concluded that Rimini Street was basically a technical violator here, that they were innocent of any wrongful intent or anything of that sort, whereas the very findings of that jury show they did not conclude anything of the sort.

If you look at the other claims that they found for Oracle, found in favor of Oracle, the computer claims under California and Nevada law, both of them required that

they be convinced by a preponderance of the evidence that there was knowing and willful misconduct and that Rimini Street did not believe their conduct was permissible at the time.

So by finding for Oracle on those two claims, this whole notion of innocence and just a technical mistake on the part of Rimini Street was clearly not accepted by the jury.

Now, why is any of this important? Well, it's important to knock down those arguments that somehow there's a proportional or a percentage discount that they're entitled to because Oracle somehow failed to have more than limited success on these claims. But it also brings us, with respect to the attorneys' fees award under Section 505, to this notion of why should this Court exercise its discretion in favor of Oracle on this case?

And in our opening motion we set forth the numerous ways and extensive amount of litigation misconduct, there's really no other word for it, and foot dragging that Rimini engaged in this case, which resulted in the fact that this case dragged on for five years, at great expense to everybody, and really there was a trial which in many respects never really had to be had.

Why is this important? Well, under this circumstances -- under these circumstances and what we've

set forth in our motion and in our reply, what is revealed is a pattern on the part of Rimini Street, a pattern of behavior during the litigation -- which, by the way, an advisory ruling on whether or not the actual infringement was willful or innocent has no bearing.

Let's look at how Rimini Street litigated this case. We pointed out that on a number of instances their responses were just plain inaccurate, to be charitable, or false, with respect to discovery requested in this case. Most notably the entire series of events which resulted ultimately in a spoliation motion by Oracle and a spoliation ruling by Magistrate Judge Leen, combined with the foot dragging that occurred in this case, the examples of Rimini Street deliberately, because there would be no other way that this could have happened, prevaricating about whether or not cross-use -- one of the most important issues in this case, cross-use of the copyrighted material by Rimini Street, whether or not that occurred, these elongated the discovery process, complicated the efforts that Oracle was required to make in order to discover the information necessary to prove it, and basically turned out to be an utter sham on the part of Rimini Street.

The Court will recall that Seth Ravin -- it took him until his testimony at trial to admit and acknowledge that cross-use happened, quote, all the time.

Going into that, and we've set forth in our motion the evidence that backs this up, they denied, Rimini Street denied that such a cross-use was occurring. And it took three and a half years of motions practice and discovery for Oracle to build the case which Rimini Street could easily have acknowledged early on in this case.

They did the same thing with the second summary judgment motion, keeping alive the issue of whether or not there was liability with respect to a couple of the software copyrights by arguing that they only used them for archival purposes when ultimately, as the evidence showed at trial, that was not true.

Under the circumstances what this Court is allowed to take into consideration with respect to deciding whether an award of copyright -- or attorneys' fees is appropriate under Section 505 is Rimini Street's litigation conduct and whether or not that increased the burden on Oracle with respect to the efforts it needed to make by its attorneys in order to prove its case.

And we've demonstrated that in our opening motion. Rimini Street's response in opposition was certainly not effective to negate any of that. And we've demonstrated that in our reply.

That forms a basis for this Court to conclude that Oracle should not be left to its own devices to pay

for activity and lawyer's activities and discovery activities that it would never have had to engage in were it not for Rimini Street's obstructive behavior in this case.

The argument made by Rimini Street that some of the attorneys' fees are not reimbursable because they dealt with issues that ultimately either Rimini Street prevailed upon or were not necessary to the proof of what Oracle prevailed upon is, of course, completely ridiculous, given the fact that this case was a seamless web of factual allegations and a situation where we had to prove all of these different elements.

There's been no effort by Rimini Street to turn around and try to parcel out any efforts made during the discovery proceedings or at trial even in the proof that Oracle engaged in which weren't necessary and thus should not be the subject of compensable attorneys' fees.

I think a very important factor that comes into this case that Rimini Street has injected is this notion that somehow Oracle's attorneys' fees' requests are burdensome and basically outrageous and in excess of what is appropriate.

But it completely ignores the fact of the conservatism that Oracle has exercised and the demands that it's made. And this is a classic example of the old

admonition, no good deed goes unpunished.

Almost $6 million in recoverable fees, over 14 percent of Oracle's total fees, was never claimed in this case, largely because some of the entries that embraced that time were block-billed with entries that we redacted.

So Oracle legal, in an abundance of caution, didn't even place those into our request for attorneys' fees in this particular case. That amounts to 14 percent of Oracle's total fees in this particular case.

But out of an abundance of caution and an interest to be fair and conservative, Oracle didn't even include those in its request.

Moreover, no attorneys' fees are claimed for any activity after November 2015. That, despite the fact that Rimini Street continues to overlitigate, obstruct, and drag this proceeding out.

In this particular case, it's a request for attorneys' fees, and yet Rimini Street has submitted expert declarations from five different experts to which, of course, in order to fully address the issues and knock down the erroneous conclusions and arguments made by Rimini Street, Oracle has had to engage its own experts in order to counter that.

It just hasn't stopped. And it never will, Your Honor, until there is deterrence to Rimini Street so

that -- when they can pay a price so that this will not continue to happen. And by that continuing to happen, I'm talking about two things.

One is defending the case on borderline bad faith with respect to how they've conducted the defense, but second of all this serial notion that they continue to engage in borderline-at-best, infringing-at-worst business activities throughout the course of litigating it at the same time.

They didn't change their business model until this Court found them to be liable by summary judgment, and then they professed, oh, we went and we changed to a process 2.0 and now everything is fine.

And yet there's another lawsuit pending now. And Rimini Street has characterized it as *Rimini II*, a declaratory judgment action on their part to get a declaratory judgment that what they're doing is okay and doesn't infringe. But coupled with that are numerous counterclaims by Oracle about this new process and how it infringes.

And the Court is well aware that, through the motion for an injunction in this proceeding, that part of Rimini Street's defense is, no, you can't enter this injunction because it will interfere with the way we're operating now.

Well, if that's the case, then they must still be infringing now, in light of the fact that the injunction we've proposed addresses the infringing conduct as found by this Court and the jury.

So what does that tell us? That tells us that Rimini Street in this particular case is content to continue to take their chances, roll their dice, go to court. Yeah, they have to pay attorneys' fees, yeah, they can tie everything up for years and years; but in the meantime let's just switch things a little different, let's try a different way of operating our business.

If you go through this whole series from Mr. Ravin's involvement at TomorrowNow, which didn't come before the jury in any great detail but the Court's aware of it and it was briefed and discussed quite extensively in the pretrial proceedings, I think what we can glean from that is that Mr. Ravin's always pushing the envelope, always close to the line, we would submit always over the line, and there's only one thing that's going to make this conduct stop, and that is the deterrent effect of not only having to pay the damages which are rightfully assessed against him, but also to pay for the long, drawn-out battle Oracle has had to engage in simply to protect its intellectual property rights.

And we had motions in limine about this notion,

a long time ago, of Rimini Street wanting to refer to Oracle with certain characterizations and negative terms. And they're back at it again here today with characterizing Oracle as a behemoth, quoting a US Supreme Court case that used the term in connection with another company, and arguing that somehow, because Oracle is successful and big, it's not entitled to its attorneys' fees because it's not hard for Oracle to go out and foot a $50 million bill; whereas it might be for some poor starving artist, the implication being that somehow Rimini Street is the starving artist in all of this.

But as a consequence, that's not justice. And as a consequence, Rimini Street can continue to play these games, try to see how close they can get to infringing without maybe getting a court to declare it an infringer at great expense to Oracle.

And this is not some random commercial case where the parties pay their money, come in, and, you know, they take their chances and take their own attorneys' fees home. This is a situation in which the very need to go that far and to have that many depositions and that many experts and that much discovery is all the consequence of how Rimini Street defended this case.

That's why it's rich when Rimini Street talks about the experts and says, well, you know, that's way too

much to pay for this expert, you know, that's an outrageous amount. They didn't need to do all that.

And yet in reality what did we find; that because Rimini Street spoliated evidence, destroyed the software library, Oracle, in order to prove its case, had to go out and basically prove another way, through extensive expert analysis, electronic discovery, through testimony, through depositions, to reconstruct what Rimini had really been up to.

And they say, well, yeah, we got rid of the software library. We were bad. We offered somebody to testify about it. Yeah, okay, you got a spoliation instruction. All is well.

But that is just emblematic of what's wrong with Rimini Street's approach to this case and why it has been ridiculously expensive in this case.

And if ever there was a situation in which the documented behavior -- and part of it occurred during trial in this Court's presence when Rimini Street finally came clean on a lot of issues, that if they had given that testimony two, three years ago, there may never have even been a trial in this case.

All this evidence, all this conduct is relevant to this issue of whether this Court should issue its -- or exercise its discretion to award fees at all in this

particular case.

With respect to the -- and they are just so many in number. The various objections that have been put forward by Rimini Street as to what's wrong with the individual billing statements, what's wrong with the rates that were charged, I just have a few summary remarks about those.

Again, with respect to the conservativism, Oracle had a billing policy which Mr. Kennedy and several of these experts addressed about limiting participation of the lawyers to 10 billable hours per day. Well, there are a number of instances in this, and it's highlighted in the declarations of my co-counsel, where time was in fact worked beyond 10 hours but it was capped at 10 hours with respect to what was sought in our attorneys' fees request.

We also deliberately did not seek attorneys' fees for the activities of in-house counsel, despite the fact that they are very involved in this case. Mr. Maroulis especially. And as a result that was reimbursable attorneys' fees which could have been claimed but in this particular case were not.

And, more pertinently, both the Morgan Lewis attorneys in their current incarnation, and as Bingham lawyers before, and Boies, Schiller & Flexner offered discounted rates. These are not even their standard rates

with respect to what was charged to Oracle in this particular case.

Now, as to the rates -- and we have a big long declaration from Dennis Kennedy about all his experience and how he knows what the market in Las Vegas is, et cetera, et cetera. That's been posited by Rimini Street. And we've had them cherry pick a number of district court opinions where courts come down to billable ranges that they find acceptable, which are considerably below what was billed in this case, and they say this proves that these rates are unreasonable and thus when multiplied by the hours worked, it produces an unreasonable lodestar.

Well, much like antitrust cases and a lot of other context, defining the market is important. I think the first thing to remember about this case is it was essentially an all-star game. The Court even commented during trial that the caliber of lawyering in this case, on both sides, was much beyond what you would get in a typical piece of litigation here or anywhere else.

Now, the argument can be, well, that's the choice of the parties. If they want to hire extremely expensive, extremely capable lawyers, they just have to pay for them. But that's the context in which we're operating here. And it moves both ways.

And this was a point that we made in our

opposition is that -- or in our reply. Curiously missing from their opposition is the fact that they had six different law firms, five of which -- actually all six of which, I think, are basically regional or national law firms, including Gibson, Dunn and Crutcher, one of the most expensive law firms in this country. And yet they have the temerity to say that it's a problem that Oracle, in this particular case, in order to go up against a team like that, had high-priced lawyers from Morgan Lewis and Boies, Schiller and Flexner.

The market in which this particular case, even though it occurred here in Nevada, needs to be evaluated is in the market for top-tier trial and copyright talent.

And that's not a ridiculous situation at all. As a couple of the cases cited by Rimini Street and one cited by us show, that -- in cases right here in this district, on occasion the courts have said, you know what, in this case it was reasonable for you to go with your tried-and-true attorneys who you're comfortable with, top caliber people from other markets. And those rates have been approved and been part of the calculation.

The other thing that I -- and these motions always put us in difficult positions because, as the attorneys participating in the case, we have to critique our relative worth or discuss comparisons between different

law firms and different people in our profession. It's always uncomfortable. But I think something to keep in mind here is this isn't a battle necessarily about out-of-state rates. I've lived in Las Vegas for 32 years. I am not an out-of-state lawyer who came in here pro hoc and charged some ridiculously, in their view, high billing rate.

My billing rate is my billing rate, and it's part of Nevada, and it's not -- it's part of the Nevada market, and it is not in any regard an outlier. And I say this -- there are -- and I'm sure Mr. Kennedy would agree with this, there are divorce lawyers in Las Vegas who bill at a higher rate than the lawyers in this case have.

And speaking of Mr. Kennedy, he can be a benchmark. He opines that the talent on this side of the room here should not have been billed any higher than $475 an hour for partners and 200 something for associates. Yet what did he charge Rimini Street for his report? He charged them $800 an hour.

Now, that isn't even for legal work. That's for basically Monday morning quarterbacking and editing our bills and basically a trip down memory lane about how he thinks various rates comport with the market at various times.

So if you just use Dennis Kennedy as a

benchmark, go to his résumé and stack it up against the biographies of anybody on this side, and you'll see that at the least the rates -- if he's market rate in Las Vegas, at the very least we're all market rate in Las Vegas, given the relative talents, accomplishments, and credentials.

And it's sad when you have to make that argument, but he injected himself into this. If he can charge $800 for this kind of a report, I assume he probably charges more for his legal services. And you can compare his credentials with the credentials of everyone else here.

So this whole rate of market rate -- and I agree there are cases out there where a judge for a particular case will say, well, it shouldn't be any more than this or any less than that. Also something to keep in mind is what kind of cases are they.

And several of them cited by Rimini Street, a couple of them were debt collection actions, one was a RCRA case. You know, there are cases where one might look at it and say, you know, almost any Nevada lawyer could have handled this case. We think the market right about now is at this rate; so that's what we should cap our fees at.

This was not the kind of case that any lawyer off the street could litigate. And you can tell just by looking at the amount of time put into analyzing the evidence in this case, the issues in this case, that this

is a one-off situation. I've characterized it as an all-star game. It had to be an all-star game because of its complexity. And that requires a little different analysis here and one which takes into account the relative values and the relative expenditures on both sides.

In our reply we had submitted evidence regarding what Rimini Street claims to its -- through its financials and its disclosures to the public that it spent on litigating this particular case. And you'll see it's in the millions. And it's -- yes, is it a fraction of Oracle's? Yes. But not a very small fraction either.

And would Oracle be expected to spend more money than Rimini Street? Yes, it would. We have the burden of proof. We're up against all the obstruction and the delay that was caused by the activity we've set out in our motion. And quite frankly we won.

And the case law, and it's cited in the pleadings, indicates that sometimes one side will spend more money than the other side. And if they win, the presumption can often be, or the inference can be, because they worked harder, they worked more. And in a situation like this, it's the results that matter.

Throughout the case law there's reference to excellent results. And there is no other way to characterize what happened at this trial than excellent

results were obtained. If Rimini Street wants to be in the fantasy land that it could have been worse, yeah, great, yeah, maybe it could. But they did not win this case.

And those issues dovetail together. Not only are we the prevailing party, but the amount of investment and attorney time, effort, and quite frankly success was worth every penny of that.

And if we are -- much has been made of this notion that, well, attorneys' fees awards should advance the interest of the copyright statute. And Rimini Street turns this completely on its head and says, well, if you give attorneys' fees to Oracle, you're discouraging defendants from making arguments in defense in these complicated copyright issues and contentious legal issues piggybacking off of case law in which awards were made in favor of the defendants because they turned out to win the case.

Rimini Street did not win. There is no public interest in saying don't award attorneys' fees, it might discourage defendants from fighting tooth and nail, dragging their feet, abusing the discovery process, spoliating evidence, all in the course of trying to defend themselves. So it's completely backward there.

Now, it was actually said best in one of the district court opinions which is cited by Rimini Street.

It was the *Liberty Media Holdings* case at page 3. Judge Navarro stated that not only does an award of attorneys' fees deter any copyright infringement -- she didn't say any willful copyright infringement -- it also deters the needless extension of litigation regarding claims of copyright infringement, thus making it more financially feasible for copyright holders to protect their intellectual property.

And that, in a nutshell, is the justification for fees in this particular case. That's exactly the situation we have here. Had nothing to do with whether or not the infringement was willful or not.

Copyright infringement -- and it is a done deal. They infringed. However they want to sweeten it up is fine. But they are infringers. And there was needless extension of the litigation regarding these issues.

And the only way it makes any sense businesswise, innovationwise for Oracle is that Oracle be compensated for this added extra effort that was necessary based on Rimini Street's conduct and that Rimini Street receive a deterrent that this doesn't happen again.

They wrap themselves in the Seventh Amendment at one point and say, well, we have the right to defend ourselves and pursue our claims, you know, to the utmost of our due process rights.

It's like, yeah, you do. But when they don't work and when your defenses lose and when in the end you're on the other side of that extreme success in the litigation, you may have to pay. Your rights come with a price.

And in this particular case nobody said they shouldn't have put forth every colorable argument they had. But if they're going to do what they did in this particular case, or if the arguments they make don't prevail, that's an entirely different situation.

Briefly on the offers of judgment. Rimini Street's argument on the offer of judgment appears to be that -- well, the logical extension of their arguments is if they had made an offer of judgment two years before trial that they would offer to have judgment entered against them for a payment of $20 billion 10 years from now, that somehow that offer of judgment should be valued at its face value for purposes of analyzing the attorneys' fees request. And that's just preposterous. But that's the logical extension of what they're going.

Because what they're saying is that the Rule 68 offers of judgement they made, which were entirely contingent, basically resulted in deferred payment over a four-to-five-year period, have been characterized by us accurately in our pleadings as a very low interest

financing of Rimini Street's business, those aren't offers of judgment. They are not capable of being analyzed as if Rimini Street had come in and said here's $60 million in July, here's $100 million in August, and you can have judgment for this tomorrow.

Oracle, if it had accepted those two offers of judgment, would not be better off than what it received in this trial. They would instead have these risky loan situations with Rimini Street where a company that's plagued by this litigation and allegations of infringement that told us at trial that hasn't turned a profit in years, that barely has -- as you've seen from Elizabeth Dean's report, barely has enough working capital and cash flow to service itself, let alone to pay off Oracle over a 5-year period.

The mere notion that somehow making those an offer to settle this case that way in the form of an offer of judgment has any impact upon the justice of attorneys' fees here is ridiculous.

I think with respect to many of the other claims that have been made by Rimini Street about the reasonableness of the eDiscovery charges and travel expenses and that type of thing, we'll leave it to the Court to see the competing reports and declarations regarding that.

But the bottom line on this case is there's a very strong public interest behind awarding attorneys' fees in this particular case. Oracle has demonstrated that we have a statutory basis with respect to the computer fraud claims, which isn't even addressed by Rimini Street, that would justify the award of fees that would qualify under Section 505 for the Court to exercise its discretion in favor of awarding fees, and we've shown you to the tune of 800 pages of backup for all the fees incurred in this case, which represent a reduced amount from what was actually incurred.

We've met our burden. The nitpicking and the criticism that we've received as to individual items or whatever, it's been addressed in Mr. Pearl's report and in the other submissions to the Court that I'm not going to get into that kind of detail.

But under the circumstances is the number large? Yes, it is. But is the value of what was received in this case large? Yes, it is. And this case isn't even over yet.

On that last point, the offer of judgment notion and the success -- relative success of Oracle in this case, half of this case is really about the injunction. It's about getting Rimini to finally stop what it's been doing for years.

And the Court will hear that in a little bit. But before any definitive judgment is made that somehow what Oracle won isn't enough and isn't successful enough, it's not done yet. And when the injunction is resolved, if Oracle succeeds in getting the injunction it needs to stop that behavior, there will be no question who the prevailing party is in this case and the justification for attorneys' fees.

Because if the resistance that Rimini has placed to the entry of the injunction is rejected, we'll see the same old pattern, which is let's keep operating in business until somebody tells me we can't and let's drag this out as long as we can. And that's why we need an injunction. And that's why we also need, and it's perfectly permissible, the deterrent effect of an attorneys' fees award in this case. Thank you.

THE COURT: Thank you, Mr. Pocker.

I note that Mr. Pocker's argument did consume the full 45 minutes. And I anticipate that the Rimini argument will certainly go in the neighborhood of that amount of time.

So in light of that we'll take a short break at this time and reconvene in approximately 10 to 15 minutes, depending on when everyone is lined up and ready to go. Thank you.

COURTROOM ADMINISTRATOR: Please rise.

(Recess from 10:52 a.m. until 11:08 a.m.)

THE COURT: Have a seat, please.

All right. Rimini argument, please.

MR. EVANSON: Good morning, Your Honor. Blane Evanson on behalf of the defendants.

I've prepared some slides to help guide my presentation today. I have a few copies for the Court and for Oracle. If you'll -- may I approach and deliver those?

THE COURT: Yes, please do.

MR. EVANSON: Your Honor, there are two separate questions that the Court must answer in deciding Oracle's motion. The first is whether fees should be awarded at all, even though Oracle is a prevailing party as to one of the two defendants.

And I want to make that point clear because it was said over and over again in Mr. Pocker's presentation that we're disputing that Oracle is a prevailing party, and that's not our argument at all. But even for prevailing parties, there's a standard that Oracle must meet in order to obtain any fees at all.

The second question is if the Court is to award fees what is the reasonable attorneys' fees available under Section 505 of the Copyright Act? And if the Court -- and on that point -- I guess on the first point there are

factors that the Court uses to guide itself. Those are the *Fogerty* factors, which I will discuss, and which Mr. Pocker did not mention.

And on the second question we submit that Oracle's unprecedented fee request in a case where it prevailed on 25 percent of its claims and obtains less than 15 percent of the damages it sought is really unprecedented and sort of on its face unreasonable.

Oracle is seeking $58 million. Mr. Pocker didn't mention that number. But $58 million is an enormous amount of money. And we submit that is not anywhere near reasonable, that is -- and we will talk about why, is the methodology that 25 percent success on the claims that Oracle brought brings the number down to about $9 million, and we submit that is the outermost cap of what is reasonable attorneys' fees and that the actual reasonable amount again, if the Court is to award any fees, would be around $5 million.

Three points I want to cover, Your Honor, on this first question of whether any fees should be awarded.

No fees should be awarded because Rimini Street was adjudicated an innocent infringer.

Second, that Oracle's success in the case, even though it was a prevailing party against one of the two defendants, was limited.

And then finally I'll touch on the rest of the *Fogerty* factors that guide this Court's decision on whether to award any fees.

Our position, Your Honor, is that the finding by the jury that Rimini Street's infringement, in its exoneration of Mr. Ravin for any copyright liability, is alone sufficient to award denial of attorneys' fees.

The jury found that Rimini Street did not know and had no reason to know that it was infringing Oracle's copyrights.

And Mr. Pocker talked about inferences that can be drawn from the jury's finding of innocent infringement. But there's no inference necessary. This was a finding that Rimini Street did not know and had no reason to know that its conduct was infringing.

And we submit, Your Honor, that no purpose of the Copyright Act would be served by awarding fees in this -- against innocent infringer as we discuss in our brief. It's therefore not surprising that no court anywhere has ever awarded attorneys' fees against an innocent infringer.

And we've cited cases affirmatively disapproving of awarding fees against innocent infringer. In fact, even Oracle's featured case, *McCulloch versus Albert Price,* which was disapproved by the Supreme Court for being too

plaintiff friendly, even in this case the Ninth Circuit said the defendant's status as an innocent infringer justifies the denial of fees.

Oracle cites no authority in response, not one case or even a commentator suggesting that attorneys' fees were appropriate or appropriately awarded against an innocent infringer. Oracle's asking the Court to be the first in history to cross that bridge.

Oracle also has no answer for its statements in its trial brief that it was seeking to prove willful infringement at trial specifically in order to obtain attorneys' fees.

Innocence is the converse of willfulness, and since willfulness favors fees, as Oracle's told the Court, innocence cuts the other way.

You also heard Mr. Pocker talk about -- you know, rail on Mr. Ravin and talk about how, you know, from TomorrowNow to this case to *Rimini II* how he's escaping infringement.

The jury found Mr. Ravin did not infringe. Oracle's not even a prevailing party against Mr. Ravin. There's no possible way that an attorneys' fees award under the Copyright Act can be imposed to deter Mr. Ravin from infringing copyrights when the jury exonerated him of any copyright liability.

The second point, Your Honor, is Oracle's limited degree of success. And, again, I just want to make absolutely clear this is not a prevailing party argument. Oracle did establish copyright infringement, innocent copyright infringement against Rimini Street.

But there is still one of the *Fogerty* factors, as the Ninth Circuit said in the *Ets-Hokin* case, one of the factors is the degree of success, even if you're a prevailing party.

And Oracle's limited success at trial warrants a denial of fees here. Oracle tried three principal buckets of cases -- buckets of claims in this case. It sought to prove copyright infringement, it sought to prove various intentional torts, and it sought to prove hacking of Oracle's computers.

Oracle lost, abandoned, or withdrew 9 out of the 12 causes of action it pursued. And that 25 percent is generous because, as Mr. Pocker acknowledged, the two hacking claims were duplicative.

In addition, as I mentioned, Oracle established only innocent copyright infringement against only one of the two defendants, and its request for punitive damages was rejected. Oracle lost completely on all the claims and theories having to do with Rimini's intentional conduct, the willful infringement, the intentional torts, the

punitive damages, every single claim and finding.

Now, Mr. Pocker mentioned that it's common to drop claims before trial. But these claims were not dropped years ago, they were not dropped even before trial for the most part, they were dropped after trial, after the parties had litigated this issues -- these issues, and in many cases the Court's rulings precluded them.

For example, the federal hacking claim Oracle dropped after trial when the Court rejected the -- in the jury instructions, the lost profits damages theory as available remedy for federal computer hacking.

So these are not, you know, superfluous issues that were hardly featured in the case. These were litigated all the way through trial.

What this means is that Oracle is again a technically prevailing party, but barely. Oracle prevailed against only Rimini Street, not Mr. Ravin. It prevailed on infringement, but only innocent infringement. And then it lost the majority of its remaining claims.

We are not aware of another copyright case in which a plaintiff was prevailing by such a slim margin. Oracle certainly has not cited a case. And being a prevailing party does not entitle one to fees. Rather the copyright gives the Court discretion to award fees. And as we learned from the solicitor general in the *Kirtsaeng* case

that is pending before the Supreme Court this term to be decided next month, attorneys' fees were awarded in only about 50 percent of copyright cases. And that is all copyright cases. That includes cases involving willful infringement, in cases where the plaintiff prevailed on every single claim, ran the tables. Given that Oracle is barely a prevailing party in this case, this is not one of the 50 percent of copyright cases where fees should be awarded.

Now, Oracle largely ignores the innocent infringement finding and it ignores the intentional torts, this whole aspect of the case that it lost, and it doesn't dispute that there's no precedent, no cases suggesting that attorneys' fees can be awarded against an innocent infringer. Instead Oracle's focus in its brief and a good portion of its presentation today is what Oracle calls Rimini's unreasonable litigation positions during discovery.

First, this is not a motion for discovery sanctions. It is a motion under Section 505 of the Copyright Act for fee shifting to a prevailing party. And the question whether a prevailing party is entitled to its attorneys' fees depends not on the discovery record but on the outcome in the case.

Every complex case involves discovery disputes.

And here they were relatively mild. Oracle points to 9 out of 250 requests for admission and 3 out of 40 interrogatories. That is not litigation misconduct by any definition of that term.

And finally, Your Honor, even if -- even if this were a discovery motion, even if Oracle were trying to obtain its fees spent in litigation in these discovery disputes, Oracle does not apportion its fees. It does not tell the Court what portion of the fees incurred were in responding -- or were meeting and conferring about those RFAs or those interrogatories.

And as the Ninth Circuit held in the *Toth versus Trans World* case, it is an abuse of discretion to award fees as discovery sanctions without that apportionment.

I mentioned the *Fogerty* factors. And here they are. And I just want to stress, Your Honor, that this is the standard for determining whether fees should be awarded. It's black and white case law.

The Supreme Court's decision in *Fogerty* and the Ninth Circuit's decisions in cases like *Ets-Hokin*, they lay out these factors that the Court considers when determining whether any fees should be available at all.

And we submit that every one of them favors denial of fees. And that is likely why Mr. Pocker did not mention them.

Innocent infringement justifies denial of fees as the Ninth Circuit held in *McCulloch*.

A low degree of success. Here at best 25 percent warrants a denial of fees. The Ninth Circuit held that in *Ets-Hokin*.

Rimini's arguments and defenses were by definition objectively reasonable, since the jury accepted many of them, if not most of them, and even the infringement finding against one of the two defendants was found to be innocent.

Fourth, deterrence. There is no reason to deter innocent infringers. The commerce department said that expressly in a recent major report on the Copyright Act that we cite in our brief.

Fifth, Oracle has been fully compensated with a paid-up license, and it is a huge corporation with no need for additional incentive to file lawsuits protecting its intellectual property.

Now, Mr. Pocker talked about this language from *Fogerty* about a corporate behemoth and starving artists. He was critical of that metaphor, but that is the legal standard. That's what the Supreme Court said in *Fogerty*. There is no reason to award fees to a corporate behemoth, and there is reason to award fees to starving artists so that these claims can be litigated.

Sixth, the purposes of the Copyright Act are to encourage meritorious defenses and to promote competition, not to saddle innocent infringers with crushing fee awards.

And then the remaining factors Oracle does not address even in their briefing.

Now, everything I've said to this point warrants outright denial of fees. That is the first question I mentioned at the beginning.

The second question is if the Court is going to award any fees, what is the reasonable attorneys' fees. And we submit, Your Honor, that it is facially unreasonable to request 100 percent of a party's attorneys' fees, $58 million, where that party prevailed in at most 25 percent of the case.

A whole string of cases from the Supreme Court and the Ninth Circuit, *Hensley*, *Farrar*, *Schwarz*, *Welch*, they all hold that where a party does not outright win a case fees must be apportioned to account for the portion of the case in which the prevailing party did not succeed. The Supreme Court's decision in *Hensley* calls this the most critical aspect of the Court's reasonable attorneys' fees analysis.

The second point I'll discuss, Your Honor, is Oracle's utter failure on its burden to show what the reasonable attorneys' fees here is, that Oracle has asked

for basically $58 million or zero.

And then, third, I'll walk the Court through Rimini's proposed methodology for arriving at a reasonable attorneys' fee.

Oracle claims and Mr. Pocker argued today that this was really a copyright case and that it obtained a complete victory because everything else the parties disputed was sort of a side show and that infringement was the main event.

Your Honor, that is simply not true. This is a slide that Oracle used in its closing arguments to the jury to summarize its theories of the case. Oracle sought to prove not only unauthorized copying, copyright infringement, but also intentional interference, lies and concealment, and computer hacking.

I'm sure the Court recalls -- it's been a while, but I'm sure the Court recalls Oracle's closing statement. For two and a half hours the theme was wall of lies. Oracle devoted the vast majority, 142 slides, in its closing to the theme that the trial finally uncovered the lies that Mr. Ravin had been telling.

And Mr. Isaacson called -- or Oracle's counsel referred to Rimini Street and Mr. Ravin as liars over 75 times in that closing.

But Oracle lost on all the claims premised on

this theme that Rimini Street lied and interfered with customer relationships, every single claim.

Oracle talked -- or Mr. Pocker talked about the evidence related to the marketplace and how that was a feature of the trial. That's absolutely true. We had all these customers' depositions. There was a whole host of marketplace evidence. That was all intentional interference evidence, and the jury rejected Oracle's intentional interference claim.

And Oracle did not tell the jury that its infringement case was the main event and the complex issue the Court was to -- or the jury was to decide. Instead Oracle told the jury that finding infringement was straightforward.

Here's what Oracle said at closing: "All you need to know to find infringement is that Dr. Davis told you that on Rimini Street's system at its facilities were almost 600,000 copies of PeopleSoft documentation. So that's the finding on PeopleSoft documentation; not much more to do there."

The primary focus of trial was Oracle's attempt to amplify the infringement, to amplify the unauthorized copying and prove that it was knowing and willful and that Mr. Ravin and Rimini Street lured Oracle's customers away by lying to them. Again, this consumed 142 slides of the

two-and-a-half-hour closing. And the jury rejected all the claims premised on that theory.

Oracle also tries to mush all the claims together, to say that these were all basically part and parcel of the same claim. Again, that is not true.

Oracle told the Court the opposite in its Rule 50 oppositions. There, in arguing against preemption of its tort claims, Oracle argued that copyright infringement is not the same as the tort claims because the tort claims contained extra elements and protect qualitatively different rights. They told the Court this with respect to all of the noncopyright claims.

Your Honor, Oracle spent a lot of time and money trying to prove all those extra elements above and beyond copyright infringement. But they've completely failed. They are not entitled to fees for that extra part of the case.

And we've laid out here in this chart how fundamentally different the three buckets of claims are. Each set relied on different evidence, it sought different relief, and alleged different harm. Again, copyright infringement is technical acts of copying for which the jury awarded a fair market value license.

The tort claims, the intentional conduct, related to Mr. Ravin's and Rimini Street's interference

with Oracle's customer relationships and is unrelated to whether the copying constituted infringement. And it sought different damage, lost profits and punitive damages, which again the jury rejected.

Computer hacking is a completely separate set of conduct. It has nothing to do with whether the copies that were downloaded infringed.

So the question is how do we determine what is the reasonable fee in this case? And Oracle offered the Court no means of apportioning its bills to account for its limited success or to account for any of the other issues that we've laid out in our brief and in the expert reports.

Mr. Pocker criticized Rimini for its five expert reports it put in support of its opposition. But that was required because Oracle offered nothing, no methodology, no analysis, no apportionment.

Oracle essentially dumped a huge set of invoices on the Court's desk and said, "Figure it out." We submit, Your Honor, that Oracle has asked the Court to award either $58,000 or zero, and the answer should be zero. But we -- and we know that it can't be $58 million because Oracle's fee request contains a whole host of problems, all of which require reductions. And I'm going to go through these four.

The first is that Oracle was required under the

legal standard to submit evidence that its rates were reasonable for the Nevada market, and it failed to do so.

And Mr. Pocker talked about, you know, a few cases that had required community local market rates. And this is not a few cases, this is binding Ninth Circuit case law. The *Welch* case, the *Jordan* case, those cases require that the reasonable attorneys' fee under the Copyright Act is Nevada market rates.

Second, Oracle's bills are overwhelmingly block-billed and plagued with a whole host of improper billing practices.

Third, Oracle seeks millions of dollars in costs and expenses that are improper or excessive.

And then, fourth, the lack of apportionment.

Now, I want to make one thing clear because Mr. Pocker was talking about, you know, whether they're worth this, whether -- you know, that somehow the Court has to determine the worth of the attorneys, whether they're worth this billing rate.

Oracle is a large, successful, and well-capitalized corporation, and it hired an army of lawyers -- able lawyers in this case, to pursue every avenue of relief. They ran up huge legal bills. And Oracle says that it paid them. All of that is Oracle's right.

What is not Oracle's right is to say at the end of the process that the Court should impose on Rimini Street the entire cost for Oracle's decision to litigate that way.

The American rule is that each party pays its own fees. And even where exceptions apply and some fees are shifted, the prevailing party is entitled to recover only reasonable attorneys' fees, only reasonable expenses.

And the appellate courts have explained that that means local market rates and reductions for things like block-billing. It limits the costs and expenses that be recovered, and it requires apportionment to limit the fees to the claims that were won.

Our experts put in an enormous amount of work to go through Oracle's fee request in detail and come up with a methodology that the Court could use to analyze the rates, the billing practices, the costs and the apportionment. And this is laid out in our brief. But I'd like to just walk the Court through it briefly so that it's clear.

The first step in adjusting the rates is adjusting the rates downward to approximate the market rates in Nevada.

Your Honor, again, the law is clear on this point. The *Welch* case and the *Jordan* case in particular.

The rates that are recoverable through the lodestar are the rates in the venue where the case is tried, here the southern district -- or here southern Nevada.

And the evidence in the record on the Nevada market rate is undisputed. Mr. Kennedy analyzed the Nevada market rate based on his over 40 years of experience and what courts in this district have awarded in past cases.

His analysis is thorough and complete. And Mr. Kennedy is probably the best person in the world to opine on Nevada market rates.

In addition to his experience and his work on this case, he has served on essentially every state bar in Nevada Supreme Court committee dealing with ethics and rates and responsibility.

Mr. Kennedy's declaration walks through the fee request in detail and in a very methodical and meticulous way shows that the rates Oracle seeks to recover and the billing practices that Oracle's counsel engaged in were unreasonable for the Nevada legal market. Oracle's reply brief does not mention Mr. Kennedy once.

Oracle offered the testimony from Richard Pearl who is a California attorneys' fees expert. He has never testified in a case in Nevada. His declaration cites no relevant Nevada experience. He does not purport to have surveyed Nevada attorneys' fees, and he does not opine on

the rates in Nevada. Instead his testimony repeatedly compares the rates in this case to those charged by attorneys in the San Francisco Bay area.

This case is not in the Northern District of California, and therefore Mr. Pearl's testimony is simply not relevant.

Mr. Kennedy's opinion on the reduction of hourly rates is generous. He provides for one lawyer of each firm billing well above the market rate, $800 an hour, which is, you know, the rate that Mr. Pocker was referencing.

Mr. Kennedy allows for Mr. Isaacson and Mr. Howard to bill at that rate. He also allows for a second lawyer at each firm, Ms. Dunn and Mr. Hixson, to bill at a rate at the top of the legal market as well. The remaining partners, associates, and staff he discounts to the Nevada market rate.

And these rates that Mr. Kennedy -- that Mr. Kennedy includes in his analysis are higher than what any court has awarded in any previous case in this district for prevailing parties. They are more than reasonable. And Oracle has no relevant evidence in response.

So just this reduction -- just applying the community Nevada market rates requires a reduction of about $9 million.

Step 2 in Rimini's proposed methodology is

reductions to account for Oracle's improper billing practices.

And the first point we've made, Your Honor, and what's laid out in the declarations, is that Oracle's lawyers billed essentially all -- or block-billed essentially all their time.

You can see from a few examples on this slide -- I'm sorry that the text isn't very legible. But you'll see that in these bills there are up to 10 different entries, 10 different tasks on a given day that span different claims in the case, and there is no way of separating the time entries that went to a certain claim or another claim, there's no way of determining whether a task -- the time spent on a task was reasonable. There's no way to analyze these bills -- or it exceedingly complicates our ability to analyze these bills.

And block-billing is not prohibited. It's not unethical. Some clients permit it and some don't.

But the key point and the reason why the courts and appellate courts have disapproved the block-billing is that it prevents the Court from being able to analyze the reasonableness of the fees and to tell which -- and to apportion the fees before the claims that were won and the claims that were lost.

The second improper billing practice is attorney

conferences. These were meetings lasting up to four hours and involving up to 16 attorneys. Over 10 percent of the fee request is for these conferences. Mr. Kennedy testified that this is an unreasonable amount of attorneys' fees and that this warrants a reduction.

Third is the redundant work. Oracle hired two law firms to try this case. Both firms worked on the same motions, participated in the same meetings, and attended the same depositions of hearings. Depositions and hearing. Oracle essentially did everything twice.

And that was Oracle's choice. It was perfectly within its right to do so. But because hiring two firms resulted in redundant work, Oracle cannot shift all those fees to Rimini Street.

Fourth is the vague entries. Many of the entries -- and these are laid out in Mr. Kennedy's and Professor Ross's declarations. Many of these entries were simply too vague for our experts to review for reasonableness.

And the long days. There are many dubiously long days in Oracle's bills. The most egregious example we list here on the slide was a 24-hour workday, which means that this person did not go to the bathroom, did not eat, did not shower, or do anything nonbillable that day. And this was a -- this particular day was a Friday during trial

where, you know, there was obviously no court on Saturday and Sunday.

It's very hard to believe that this individual and lots of the 20-plus hour days that are discussed in the declaration are accurate or reasonable.

Finally, there are about a half million dollars in fees billed for clerical tasks at hundreds of dollars an hour. These charges are not reasonable.

So Mr. Kennedy and Professor Ross's testimony is that all of these improper billing practices warrant a reduction of -- a combined reduction of 30 percent. And this reduction is conservative and absolutely supported by the case law, Your Honor.

Numerous courts, and we cite these decisions in our briefs, have imposed a 10 to 30 percent reduction for each of these practices. And a 30 percent reduction for all of them combined is fully supported by the evidence and warrants a $6.6 million reduction.

Step 3 is the unreasonable and unwarranted costs. Oracle claims in its brief that it is presumptively entitled to costs. But that is not the standard of the Copyright Act. Whether Oracle obtains its costs is, as with its fees, governed by the *Fogerty* standard. That's footnote 11 of the Supreme Court's decision in *Fogerty* and several courts have held that.

And so our position is that costs should be rejected, just like fees, outright for all the reasons I mentioned at the outset.

Oracle's request for costs is also completely unprecedented for a copyright case and, we submit, excessive.

First is the Rule 68 offers. And Mr. Pocker mentioned these. Your Honor, Rimini Street wanted to resolve this case without a trial. Mr. Pocker said that, you know, this case didn't need to go to trial. And that was absolutely our position too.

And we made three offers of judgment to Oracle, two of which exceeded the verdict. And this is also a complete answer to Oracle's argument that Rimini Street somehow litigated this case improperly or overly aggressively. And because the second and third offers exceed the jury verdict, the fees and costs that Oracle incurred after those offers must be deducted from the amount that Oracle receives.

I only just mention Mr. Pocker talked about the discount rate and the time value of money. But as we point out in our brief and -- that is -- that is not the law. The Supreme Court in the *Marek* case did not discount the offer. And in the *Rolland* case we cite in our brief, the court expressly rejected this argument.

And Oracle does not cite a case for the proposition that you discount a Rule 68 offer to account for the time value of money.

Second is contract attorneys. Mr. Kennedy's opinion is that two of the contract attorney firms that Oracle hired should not -- fees should not shift because time entries are vague or in some cases totally nonexistent.

Some of these contract attorneys were billing at rates commensurate with senior associates and even junior partners in the Nevada market.

Oracle's eDiscovery costs are frankly unbelievable. Our expert Mr. Opsitnick, who has decades of experience in this industry, was flabbergasted by the amount they paid. The rates they paid were well above market, and Oracle inexplicably did not receive any volume discount.

So Mr. Opsitnick's opinion is that these costs should be reduced by 3.7 to $5.8 million, and for our analysis we adopted the lower number, the 3.7 million.

Expert fees, Your Honor. Again, Oracle's request here is unprecedented. Only two cases in the Ninth Circuit have awarded expert fees under the Copyright Act. Those courts awarded $31,000 and $50,000. Oracle's requesting almost 8 million, including for experts who did

not testify at trial and whose testimony the jury, in whole or in part, rejected.

The Court will remember, just one example, Ms. Dean's primary damages model before trial was a hypothetical license. That was the main thrust of her report. But we challenged that model in a Daubert motion. And in response Oracle withdrew it. But Oracle is including in its fees all the costs, all the fees associated with coming up with that damages model that it jettisoned before trial.

And finally, Your Honor, other costs. We don't really know what these are. These are not itemized or explained anywhere by Oracle. They say that they're buried somewhere in the invoices. And Oracle acknowledges that some of these costs are overhead, which are not recoverable.

The testimony from Mr. Kennedy, Professor Ross, Mr. Trunko, and Mr. Opsitnick is that the improper and unreasonably excessive costs that Oracle seeks requires a reduction of about $21 million.

Finally, Your Honor, step 4, to come back to the point that Oracle did not win on all its claims; in fact, it lost most of them. And as I mentioned, the most generous view of the outcome of the case, we submit, is that Oracle prevailed on 25 percent of its claims and

obtained 15 percent of its damages; yet it inexplicably seeks 100 percent of its fees.

The case law from the Supreme Court and the Ninth Circuit requires that the amount of any cost in attorneys' fees must be apportioned to account for the plaintiffs' limited success. The Supreme Court in *Hensley* held this is the most critical aspect, again, of determining the reasonableness of a fee award.

Oracle did not give the Court any means of apportioning its bills. They did not attempt to tell the Court which fees, which portion of the fees were spent on which claims or which portion of the fees and costs were attributed to the claims that it won.

In fact, Oracle's counsel's billing practices, the block-billing, makes it impossible to do this. So Rimini's experts could not even go through Oracle's bills and carve out the time spent on the claims that they prevailed on and the time spent on the claims that they lost.

So our brief and the expert reports lay out four reasonable ways of apportioning Oracle's fee request according to Oracle's degree of success. And I've put the two simplest methods on the slide. And we submit that either would be a permissible way for the Court to apportion fees.

First, again, the 25 percent degree of success would require a $15.5 million reduction. And, again, this is a conservative degree of success because it assumes Oracle won on three claims, even though two of those claims were duplicative, and the copyright claim was successful against only one defendant, and the defendant it was successful against was found to be an innocent infringer. So a 25 percent degree of success really is the outermost cap.

And the second method is based on damages. Oracle sought $341 million but obtained only $50 million. And that would require a $17.7 million reduction.

Now Oracle, in its briefs -- and I didn't hear it today, but in its briefs, in its reply brief takes, you know, shots at these analyses and at the idea of reducing a fee award based on a mathematical calculation based on a portion or percentage.

The Ninth Circuit has absolutely upheld that. In the *Schwarz* case the Ninth Circuit said expressly that where the Court is left to its own devices, which it absolutely is here, mathematical approach is consistent with *Hensley* and authorized. And that's also in the *Ryan* case at 786 F.3d 754. It's a case from last year.

We have assumed the most conservative, again, apportionment number for this analysis, the 15.5 million.

And we've assumed for purposes of this analysis that the jury's verdict on the hacking claims stand. And I know the Court did not ask for argument on this. I just want to make our position clear that those claims should be thrown out entirely. But this analysis assumes that they remain in the case.

And if the Court were to throw out those claims, further reductions would be required because that would be even a lower degree of success in the case.

So to sum things up, this is how we and our experts arrive at the $5.2 million figure which we think is the reasonable fees; again, if the Court is to award any of them.

First, you reduce the hourly rates to approximate Nevada market rates.

Second, you reduce for the unreasonable billing practices.

Third, the unreasonable and unwarranted categories of fees and costs are removed.

And, fourth, you account for Oracle's limited degree of success.

These are all widely accepted reductions supported and, in some cases, compelled by the governing case law cited in our brief and in Mr. Kennedy's declaration. And we submit this methodology, Your Honor,

is very well supported. It's based on meticulous analysis of multiple experts and the judgment of Dennis Kennedy, who has decades of experience dealing with these very issues in the southern Nevada legal market.

$5.2 million is a reasonable number, which the Court can also confirm with a, you know, back-of-the-envelope reality check. Remember that Oracle prevailed on only 25 percent of its claims. Cutting the $58,000 request by 75 percent results in a $9 million cap. And then a 40 percent reduction for the billing practices and unwarranted costs takes off another 40 percent, which gives you about $5 million.

Rimini Street's position remains that there should be no fees awarded in this case. Any fee award here would be completely unprecedented because no court has awarded fees against an innocent infringer, particularly where the plaintiff prevailed against only one of two defendants on only a fraction of its claims. But if some fees are awarded, the proper amount is $5 million.

I'm happy to answer any questions the Court has.

THE COURT: No, I don't have any. And I thank you, Mr. Evanson.

MR. EVANSON: Thank you.

THE COURT: All right. That will conclude argument on the attorneys' fees portion. And we're 15

minutes before the lunch hour.

Why don't we plan on reconvening at 1:15, and we'll start directly into the argument concerning preliminary injunction.

All right. Thank you.

COURTROOM ADMINISTRATOR: Please rise.

(The noon recess was taken at 11:43 a.m.)

* * *

RENO, NEVADA, MAY 25, 2016, 1:18 p.m.

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THE COURT: Good afternoon. Have a seat, please.

All right. The record will show that we are reconvened for the hearing of motions today. We've completed the arguments pertaining to the attorney's fees motion and now turn to the motion by Oracle for permanent injunction.

You're welcome to go forward, Mr. Hixson.

MR. HIXSON: Good afternoon, Your Honor. I'll plan to talk for 30 minutes and then reserve my remaining 15 for reply.

THE COURT: All right. Thank you.

MR. HIXSON: So this is our motion for a permanent injunction, for disposition of infringing copies, and for judgment on Oracle's unfair competition claim.

I'm going to begin with the permanent injunction, focusing first on the irreparable injury and the inadequacy of the remedies at law.

THE COURT: All right.

MR. HIXSON: The parties have focused their briefing on the *eBay* standard that established the four-factor test for the issuance of an injunction. I'd

like to speak for a moment about Chief Justice Roberts' concurrence in that case. He joined the unanimous opinion for the Court, and then they also wrote separately.

And the chief justice noted that since at least the early 19th century courts have granted injunctive relief after finding infringement in the vast majority of patent cases. And the chief justice sought to explain why when you have a discretionary four-factor test, in the vast majority of cases courts were enforcing patent rights in addition by an injunction. And the explanation he provided is that a patent is a right to exclude, to stop somebody else from using your invention.

But monetary remedies allow the infringer to use the invention against the patentee and simply charge a price for that. They don't stop the infringement or protect the exclusion right. And this was the explanation that the chief justice gave for why this four-factor test inevitably in patent cases seems to lead to enforcement of the right to exclude through an injunction.

The reason I draw your attention to the concurrence is because a copyright is also a right to exclude. Title 17, Section 106 of the Copyright Act gives Oracle the exclusive rights to copy, to distribute, to reproduce, and to prepare derivative works of its software.

However, Rimini Street has been exercising those

rights that belong to Oracle for years and continues to do so.

The fair market value damages award allowed -- allows for that use by Rimini and charges a price to Rimini. But like monetary remedies in a patent case, that damages award doesn't vindicate Oracle's statutory right to exclude.

Oracle wants to stop Rimini from using its software. That is its right under Section 106. And that is the right that is irreparably harmed and that is not vindicated through a fair market value damages award.

We cited for the Court in our briefing the Federal Circuit's decision in *Douglas Dynamics*, which focuses on the exclusivity of rights under -- again under patent law.

The Court recognized that the patent is this right to exclude and that often exclusivity is the primary value of it. And the Court explained that when two companies are in competition with one another, the patentee suffers the irreparable harm of having to effectively compete against itself, against its own products being used against it.

Oracle suffers from that kind of irreparable harm here as well. Because every time it goes against Rimini head-to-head trying to retain a customer that may

want to go to Rimini, Oracle was having to compete against it's own copyrighted software used unfairly by Rimini to draw their customer away.

This right to exclude is something that can only be vindicated by an injunction from this Court telling Rimini to stop exercising Oracle's exclusive right under Section 106. Only a permanent injunction by this Court can remedy this irreparable harm that Oracle has suffered.

There's also another type of irreparable harm that is not adequately remedied by the damages award, and that is Rimini's continued infringement and certainly the threat of additional infringement.

As the Court knows, there is a second case between the parties. Rimini says that following the Court's summary judgment orders in 2014 they cleaned up their act. We say they didn't. And that's in dispute in the second case.

And I realize that case is not before you today. But -- so you're not in a position to make factual findings about Rimini's 2.0 process as they call it.

But what is before you today is our request for a permanent injunction. And we put forward specific language for the Court to consider taken from the summary judgment orders, taken from the jury instructions, and the finding of liability from the jury across the board in our

copyright registrations.

And something remarkable happened in Rimini's opposition. They said that if you were to enforce those terms from the jury instructions and the Court's orders and grant that injunction, Rimini Street represented to the Court that that injunction would impact their current, their ongoing processes that they continue to use today. This is an admission by Rimini that they continue to engage in the same actions that this Court and the jury determined to be copyright infringement.

To give an example, we asked for an injunction against the preparation and distribution of derivative works based on Oracle's software. Certainly the derivative works issue was litigated at trial.

The first witness, Dr. Randall Davis, gave extensive expert testimony about Rimini's creation and distribution of patches and updates.

Rimini's own president, Mr. Ravin, admitted that Rimini distributed these all the time.

Rimini's witness Mr. Benge confirmed that this was true as well.

The jury was presented with extensive documentary evidence showing how these patches and other derivative works were created and the hundreds of customers to whom they were distributed.

This Court instructed the jury on derivative works in Jury Instructions No. 21 and 24 concerning copyright liability and the license defense. And the jury found liability on every one of these copyright registrations.

So the legality of derivative works was adjudicated in the first case. It was adjudicated in the trial last fall. And the evidence was clear. And we are asking for an injunction to enforce that adjudicated determination.

But Rimini comes back now and says that they're still doing it, that they're still doing it today, and that this proposed injunction would impact their current terms. This means the conduct is ongoing. The infringement is not a thing of the past; it's continuing.

In similar vein we proposed an injunction that restricted the software to the licensee's own computer systems. That prohibited the cross-use between customers of software, that restricted the use to the customers' internal data processing operations.

These issues too were all decided by the Court on summary judgment and by the jury following the Court's jury instructions. The language about the licensees' own computer systems comes from the Court's summary judgment order in February 2014 and from the jury instructions

concerning the PeopleSoft documentation, the Siebel and the JD Edwards software as well.

Likewise, the cross-use and the internal data processing operations came from the Court's summary judgment orders and the jury instructions.

In fact, internal data processing operations is an exact quote from the PeopleSoft licenses that Rimini stipulated apply uniformly to its PeopleSoft customers.

And Oracle's witness Richard Allison gave extensive testimony about the meaning of that term just as Dr. Davis gave testimony about what is cross-use, namely the cloning of environments from one customer to another, the development of patches or fixes; in other words, derivative works with one customer's software that's then supplied for the benefit of another customer.

And the jury followed the Court's instructions, which were in turn adapted from the summary judgment rulings, and again ruled in Oracle's favor across the board.

But when we came to the Court with a proposed injunction that would enjoin those adjudicated practices, again Rimini says that that would affect their current processes.

So before you is in effect a representation by Rimini that the infringement hasn't stopped, it is

continuing, it's ongoing. This is irreparable harm. We have no adequate remedy at law for this. We need an injunction.

Perhaps the most astonishing admission by Rimini was in response to our request for a disposition under 17 U.S.C. 503(b). Rimini claimed previously to the Court that they adopt an all-remote model, that the software that was infringing is no longer on their systems.

And so we asked for a disposition of the computers and storage media that contained the infringing software. And here Rimini threw up its arms in a panic and said that this would heavily impact their current ongoing business of supporting customers.

This means that their computers must be a wash in Oracle's software, in copies that the jury found were all infringing.

And so what we have here is an admission by Rimini that this conduct is ongoing, and the only way to stop ongoing conduct is for the Court to issue an injunction.

But I do want to also address the hypothetical. What if Rimini had actually stopped infringing in 2014? Because they say this, they claim that after the Court issued its order in February 2014, Rimini says it stopped its infringing ways.

We now know that that's not really true. But we should talk about the hypothetical. What if it were true that after years of litigation, after years of hard-fought discovery disputes, after heavily litigated summary judgment motion where the Court found they were infringing, what if it were true that they stopped then?

The case law is clear that you should still issue an injunction. Because under the Voluntary Cessation Doctrine, that doesn't count as a voluntary cessation, and the threat of resuming the infringing activity is substantial and warrants an injunction.

We've cited a number of cases to that effect. Probably the most on point is *MGM v. Grokster*, another copyright case in an eerily parallel factual situation. There the defendant lost on infringement on summary judgment, and thereafter it claimed it would stop infringing and there was no need for an injunction.

And the Court rejected that and issued a permanent injunction explaining an injunction remains appropriate to ensure that the misconduct does not recur as soon as the case ends, quoting a similar case from the Seventh Circuit.

To the same effect is the DC Circuit's decision in *Disney v. Powell*. There, after years of hard-fought litigation, the defendant admitted at trial that having

engaged in copyright infringement, much as Mr. Ravin after years of denial admitted the cross-use occurred at Rimini Street all the time, and in *Disney v. Powell*, the defendant said it acted in good faith, it would change its infringing ways and stop, much as the story that Rimini is spinning here.

And the DC Circuit agreed that wasn't enough. It wasn't a voluntary cessation, it happened as a result of litigation in the face of undisputed evidence of liability.

And so this is the line the courts draw, that when there's an order, a finding of infringement, when there's an admission at trial in the face of evidence of infringement, that at that point if the defendant stops, at that point if they say they won't continue to infringe, that's not good enough anymore. It wasn't a voluntary cessation, it was beaten out of the defendant.

And the Ninth Circuit case law in the *SEC v. Koracorp* and the Supreme Court decision in *US v. Parke, Davis* that are routinely cited by courts on these points support that.

So even if we adopted Rimini's -- even if the Court were to believe Rimini's hypothetical that they stopped in 2014, that wouldn't be good enough because they did it only after you ruled that they were infringing.

And we should recognize the reality that the

courts recognize that Rimini has every financial incentive to continue and certainly to resume infringing if no injunction is entered against it.

Mr. Ravin testified how Rimini, by not developing its own software and by cross-using between customers, was able to very efficiently build scale in his business and acquire many more customers. That would be true tomorrow just as it would be true years ago if there's no injunction in place. Rimini has shown that its promises can't be trusted.

At the beginning of this case Rimini denied it had a software library. But the truth is it had one, and when it knew that litigation was coming it destroyed it and then lied about that, for which there were ultimately spoliation sanctions.

When Mr. Ravin saw his former company TomorrowNow stop having local copies of software on its servers -- you saw that, the jury saw it in PTX 30 -- he viewed that not as a warning to him that he should stop his infringing ways but as a business opportunity for Rimini to press forward, confirming that Rimini sees this financial incentive to continue infringing.

And so that's why cessation in the teeth of a summary judgment order, even if that were what happened, wouldn't be sufficient to deter a permanent injunction.

Rimini also argues that it shouldn't be enjoined because it's an innocent infringer. That's wrong for two basic reasons.

First, an injunction is prospective. A permanent injunction wouldn't address what happened last -- yesterday or last year or five years ago. A permanent injunction addresses what will happen in the future. And any future infringement by Rimini wouldn't be innocent at this point. At this point they know -- from the Court's summary judgment orders, from the jury verdict, they know that what they did was infringement. And so an injunction directed to the future is not aimed at an innocent infringement -- infringer.

And, second, the cases that Rimini cites about innocent infringement are really just cases that involve the voluntary cessation doctrine, such as the *Dolori Fabrics* case that Rimini cites.

There have been cases where as soon as an infringer is put on notice that it was infringing, it immediately stopped before litigation was filed, before court orders were entered against it, before spoliation sanctions were entered against it. And that's what Rimini cites, those cases in which there was true voluntary cessation.

And we acknowledge that those cases are out

there in the courts where people who have, as soon as they were put on notice they were infringing, stopped and they didn't need a court to order them to do something. That's clearly not the situation we have here. And Rimini's reliance on those cases is misguided.

First of all, there's been no stop at all to Rimini's infringement. Their opposition brief makes clear that their infringing continues today.

But, second of all, even if they had in this hypothetical world stopped in 2014, that wasn't voluntary. It didn't -- they didn't stop as soon as they were on notice. They -- that would have been four and a half years after Oracle filed the lawsuit, after years of discovery aimed at prying the truth out of them after a hard-fought summary judgment.

This case is much more like *MGM v. Grokster, Disney v. Powell,* and the others we've cited where there's continued infringement and any change in their support processes was done essentially against their will as a result of the Court's summary judgment order.

There's a third type of irreparable harm that we've suffered here in adequate remedy at law, and that's injury to business reputation and goodwill. And we've cited to the Court a number of decisions, including the Ninth Circuit's decision in *Apple v. Psystar,* where injury

to business reputation and goodwill were the sole irreparable harm that sustained that injunction. And courts have repeatedly issued injunctions to protect that type of interest.

Here the evidence at trial established that there was injury to reputation and goodwill from Rimini's infringement. As I've said, Mr. Ravin proudly testified that Rimini made a business decision not to develop its own competing software. So it didn't incur any of those development costs. And it could go out and offer 50 percent off because it was using Oracle's software.

And we presented to you the testimony of Oracle's CEO Safra Catz, who testified about the harm to the business relationships that Oracle has suffered as a result of this, that when Rimini comes in and says, "We can give you similar support, we can give you vendor level support and you don't have to pay Oracle's prices," that customers now see less value in the support from Oracle; understandably, if they think they can get the support cheaper down the street.

And she talked about the injury to Oracle's customer relationships and the harm in how customers perceive Oracle.

And she and Edward Screven testified about the harm to Oracle from Rimini telling customers that they

don't need to upgrade because they can use Rimini's infringing support instead.

And Mr. Screven testified about the need for updates for security purposes so that customers can keep their software secure and how if customers don't update they can become frozen over time and ultimately blame Oracle if their software doesn't work as it should because they've gone with Rimini and not updated their software.

We also had expert testimony from Edward Yourdon and Elizabeth Dean talking about how the promise of vendor level support at 50 percent off, which Rimini can do only because of infringement, hurts the bonds between Oracle and its customers.

All of this evidence shows the injury to goodwill and reputation.

And we cited to the Court cases that have held this type of evidence more than sufficient to sustain an injunction. The *Teller v. Dogge* decision from the District of Nevada issued a permanent injunction on summary judgment based on the declaration by the plaintiff.

There's the *Harolds Stores* case out of the Tenth Circuit where the Court held that a corporate officer familiar with company history, the financial statements, and customer relationships may offer testimony on harm to goodwill.

That's what we did here, with Oracle's CEO providing exactly that type of testimony, all of which was admitted without any objection at the time by Rimini Street.

What's also interesting is that there's no contrary testimony. There's no testimony that Rimini's conduct somehow failed to harm Oracle's reputation and goodwill. Rimini points to testimony by customers at trial, customer depositions that said they were unhappy with the relationship with Oracle.

The Court may recall the live testimony of Brian Baggett, who testified that Bausch and Lomb was satisfied with the quality of Oracle support, but they didn't see the value in it because they thought it was too expensive. Rimini points to this and claims that testimony supports them. But it doesn't because it confirms the injury to reputation and goodwill. It confirms the very harm that Oracle's CEO testified about.

The fair market value damages award does not compensate Oracle for this injury to reputation and goodwill. And you can recall this from the testimony of both sides' experts about how they calculated damages.

Mr. Hampton put in a fair market value number that was aimed at Rimini Street's avoided costs, and at cross-examination some of his cost estimates were revealed

to be too low. Mr. Hampton didn't put in anything based on injury to Oracle's reputation or goodwill that didn't factor into his analysis.

And when Ms. Dean calculated the fair market value of a database license, she focused on the number of users and the number of licenses that would be needed, but no part of her opinion either intended to calculate harm to reputation or goodwill.

So this is a type of injury to Oracle that has not been compensated for and does not have an adequate remedy at law.

Now, Rimini argues that the jury's failure to award lost profits for copyright infringement means the jury found no causation. They say that Rimini must have thought -- or that the jury must have thought that Rimini's conduct didn't harm Oracle.

But that's not true. Because the Court's instructions to the jury require the jury to find injury to Oracle on all of the claims on which Oracle prevailed. And I'm referring specifically to Instruction No. 28 on copyright infringement, explaining the damages had to prove causation and injury to Oracle.

And, of course, Instructions 50 and 55 on the California and Nevada computer access claims required proof of injury and harm to Oracle.

And so the jury's awards in favor of Oracle on all of those claims means that they did find injury and harm.

Now, they did not quantify a lost profits number. They don't explain their reason. They didn't give one.

But courts have looked at that and said that irreparable harm can be present even where lost profits are difficult or impossible to improve.

We cited the Federal Circuit's decision in *Mytee Products v. Harris*.

And in fact a lot of courts have gone further, and the lost profits are often a very difficult type of damages to prove and the difficulty of proving it is an additional reason why the injury to harm, the injury to reputation and goodwill is precisely considered an irreparable harm of the type that justifies an injunction.

And in fact Rimini Street in its closing to the jury remarked on this. They argued that it was very difficult to quantify Oracle's lost profits, further bolstering the view that while the jury did find causation, they weren't able to put a number on lost profits, which courts agree is a reason why these types of injury are irreparable, that they're difficult to remedy at law, and further supporting our request for an injunction.

So that's irreparable harm and remedies at law.

The balance of hardships and public policy are relatively straightforward. We're simply asking for an injunction against conduct that has already been adjudicated to be illegal. There is no public policy in allowing conduct like that to continue at all. The balance of hardships tips entirely in Oracle's favor on this.

Rimini does try in their opposition brief to resuscitate their copyright misuse defense that the Court struck years ago. However, we're not asking for an injunction to shut down the lawful business practices or to stop any form of support, we're simply asking the Court to enforce Oracle's copyrights and to enjoin Rimini Street from further infringement. There's no conceivable way why public policy would want to deny Oracle that type of remedy.

Let me turn next to the tailoring of the injunction. What we did in drafting this proposed order is we looked at the Court's jury instructions, in particular Instruction Number 24, which instructed the jury about the various different product lines, and we looked at the Court's summary judgment orders, and then we took some of the testimony from trial, and that's how we came up with them.

So all of the categories, all of the prohibited

conduct lines up exactly with the Court's summary judgment orders and with the instructions the Court gave to the jury.

Let me address briefly some of the categories that Rimini complains about. They complain about the derivative works language. But we've cited the *Craigslist* case and the *Apple v. Psystar* cases in which the courts in the Ninth Circuit upheld an injunction that used the term derivative works.

And Dr. Davis at trial also explained what a derivative work is. And this Court's instructions to the jury also used the term derivative work.

So an injunction against the preparation and distribution of derivative works tracks this language in the Court's orders and in the jury instructions that they followed to find infringement against every copyright registration at issue.

Likewise, licensees on computer systems was a term from the Court's summary judgment order. It was a term from the jury instructions. And same with internal data processing operations.

Benefit was a term that Dr. Davis explained on the stand. And the various restrictions involving JD Edwards' and Siebel's source code, those came from Jury Instruction No. 24.

And the prohibitions on copying and distribution of Oracle database, again those came from the Court's second summary judgment order in August of 2014, where we just lifted language out of that order and put it into the proposed injunction.

So we -- we have done our work to put together language that tracks the Court's orders. And I think in both our moving and reply papers we've addressed the specific complaints Rimini has.

They did say in their opposition that they want a second bite of the Apple. They said that if Your Honor is considering issuing a permanent injunction that you submit a draft for the parties to comment on.

We urge the Court not to do this. We did go through the effort of meticulously crafting a proposed order. They have had every opportunity to comment on that and us to respond. And so we think that you can go ahead and enter the order.

It has been quite some time since briefing concluded on the permanent injunction motion. That was last November, I believe. And we need that to be finalized for there to be a judgment in this case. And we submit that it's time for that, six and a half years after we filed, that we should get the injunction to which we're entitled.

Let me turn then to the second of the three things we request in the motion, and that's the disposition order under 17 U.S.C. 503(b).

Here Rimini has confused two different copyright remedies, a disposition under 503(b) with an impoundment under 503(a). And all of Rimini's authorities are off point and don't apply because they all talk about impoundments.

An impoundment under 503(a) is analogous to an injunction. Under the plain language of the statute a Court can issue an impoundment at any time in the proceeding. It can do it at a TRO, at a preliminary injunction or a permanent injunction. And it's discretionary in that way.

Courts have looked at that, the fact that an impoundment can be issued at a time in the proceeding and have analogized that to an injunction and have applied the *eBay* factors to 503(a), irreparable injury and so on.

And Rule 50 -- or Rule 65, Federal Rule of Civil Procedure 65, that governs the issuance injunctions, explicitly applies in subsection F to 503(a). So those standards, the *eBay* standards for an injunction, apply to an impoundment.

But 503(b) is different, and Federal Rule of Civil Procedure 65 does not apply to 503(b). And there's a

big reason for that. A 503(b) disposition can only happen after the finding of infringement. It can't be preliminary. It can't be the TRO. It has to be after there has already been a final adjudication of infringement.

And so you don't have to worry about things like likelihood of success because the plaintiff would already have succeeded. There is no case law holding that a disposition order under 503(b) needs to meet the standards for an injunction or needs to meet the *eBay* standards.

Now, we submit we have made such a showing and that the -- if such standards were applicable, a disposition order should still issue. But there isn't any authority that we need to satisfy those standards.

Instead, the disposition order is governed under the permissive standards explained by the Second Circuit in *Rogers v. Koons,* which described it as an equitable remedy issued under the broad powers vested in a trial of judge under 17 U.S.C. 503(b).

The form of the disposition that we've asked for was to put the computers and storage media that had the infringing software into an escrow, a neutral third party, rather than turning it over to Oracle. We think this would be fair because it would allow both sides to have access to it, as appropriate, for discovery purposes in the second

case.

Rimini has objected to this escrow provision. They say it's unwarranted to turn it over to a third party. We were trying to be nice. We were trying to oppose a disposition order that wouldn't unduly interfere with the second case.

But if Rimini doesn't want an escrow with a neutral third party, then this Court can do what is typically done in a 503(b) disposition and order the materials turned over to Oracle for it to have because they contain the infringing software on it.

We would be fine with either remedy under 503(b). The reason we proposed the escrow is because we thought it was less prejudicial to Rimini if the Court were to enter that type of order.

Finally, last but not least, is our request for a judgment on our unfair competition law claim. This is the California state law claim under Business and Professions Code 17200. That statute makes it unlawful to commit any unlawful, unfair, or fraudulent business practice.

Under the Supreme Court -- California Supreme Court's decision in *Cel-Tech*, the UCL borrows violations of other laws and makes them violations of the UCL.

Here the jury has found liability under the

California computer access statute, and so the UCL borrows that violation.

There's no right to a jury trial under 17200. The case law is well established on that. We've cited that in our papers. I don't think Rimini disputes that, that this is a claim to be tried to the judge.

Here we are, Your Honor, trying the claim to the judge. And so we would ask for a judgment to be entered in Oracle's favor because having prevailed on the California computer access claim action, we necessarily prevail on the UCL claim.

And so with that, unless Your Honor has any questions, I'll save my remaining time for reply.

THE COURT: All right. Thank you, Mr. Hixson.

All right. Rimini response. Mr. Rand?

MR. PERRY: It's Mark Perry, Your Honor, for the plaintiffs.

THE COURT: I'm sorry. I apologize. I haven't had you here before.

MR. PERRY: I'll take those in reverse order as Mr. Hixson presented them, if I may.

The UCL claim is entirely derivative of the hacking claims on which we heard nothing else from Mr. Hixson today so I assume we won't in rebuttal. We'd move for judgment on the hacking claims, and we would

submit on the papers on the hacking claims, and the UCL claim falls with the hacking claims.

I do have, Your Honor, a short slide deck as well. If I may approach?

THE COURT: Yes.

MR. PERRY: Thank you, Your Honor.

The second of the three points that Mr. Hixson raised was the disposition order. And I agree there's confusion here.

Your Honor, disposition does not mean put in escrow. Disposition means dispose of. 503(b) authorizes the Court to order the destruction or reasonable disposition of the copies, as opposed to 503(a), which is the impoundment provision, which is -- can be done with an escrow.

Your Honor, if the defendant has a hundred unauthorized copies of The Catcher in the Rye, 503(a) lets the Court impound them during the trial, put them in the court registry so they don't enter the stream of commerce, and 503(b) lets the court destroy them after the trial or give them to the public library system so that they don't get sold by the defendant.

That's what that provision is for. It has nothing to do with seizing all the computers and servers run by a computer software services corporation, which is

what Oracle is seeking here.

Your Honor, they're seeking not just the copies, in other words, but every computer and storage media on which they are stored. No case that they cite and no case ever decided under 503 has ever authorized that. In fact, every case cited by Oracle has involved willful infringement. And I'm going to talk more about the importance of that point in connection with the injunction.

This Court would have to make a finding that destruction of the computers is authorized. They haven't even tried to make that showing.

Now, Mr. Hixson said today that our opposition to the seizure and destruction of our computers must mean that we have copies still on them. They know that. We have copies still on them because we're required to retain them for document preservation because there's ongoing litigation, Your Honor. If we destroyed those copies, they would bring another spoliation claim. It's no surprise those copies are there, that they're not being used. That's the *Rimini II* case as to what that's all about. But this suggestion that we've admitted liability is both not supported by evidence and just not true.

Your Honor, a destruction order, a disposition order also is not a discovery device. They can't get -- you know, Oracle wants the computers apparently so they can

poke around in them. They have discovery in the second case. They can use it for that.

Now, more importantly, though, you heard Mr. Hixson say at the end of his presentation a 503 order is an equitable remedy, as such it must comply with Rule 65, that's what 65(f) says, it says impoundment. But it clearly applies to the whole provision. Their order obviously doesn't comply with Rule 65. And it must comply with all the *eBay* factors.

The Court in *eBay* and in many other cases, such as *Winter,* has said that any exercise of the traditional equitable powers by this Court sitting as an equity court must comply with the traditional standards of equity including the four *eBay* factors.

Oracle hasn't tried to make out the four *eBay* factors as to the disposition order. It can't or it collapses into their argument on the injunction, in which case the Court should decide them together.

So I would like to address them together because I think it's the same considerations that apply, although when you're talking about seizure and destruction of computers in spades.

So on to the main event, if you will. The Copyright Act injunction, the permanent injunction requested by Oracle.

To set the stage, the jury exonerated Mr. Ravin of all claims under the Copyright Act and found that Rimini Street's challenged acts while infringing were innocent.

The jury's verdict of a $35.6 million fair market value license fully compensates Oracle for any harm that is suffered. On this record, Your Honor, we submit that no permanent injunction can or should issue under the Copyright Act.

The statute, of course, provides that the Court may enter a permanent injunction. It is entirely discretionary with the Court. And Oracle bears the burden of proving its entitlement to an injunction.

The Supreme Court expressly warned in the *eBay* case that automatic issuance of copyright injunctions even after a finding of liability has been established.

My colleague cited you to Chief Justice Roberts' concurrence, in which he observed that historically the majority of patent cases have resulted in injunctions. That is true.

Mr. Hixson drew from that, quote, that it's inevitable, end quote, that a finding of liability should lead to an injunction. That was his word, inevitable.

Your Honor, inevitable means automatic. It is not inevitable. The holding of *eBay* is that injunctions are not inevitable, they're not automatic, and even if they

apply in the majority of patent cases, they don't actually get issued in the majority of copyright cases, and they certainly shouldn't be issued -- an injunction certainly shouldn't be issued in this copyright case for a number of reasons.

Your Honor, we'd like to make three sets of key points regarding the injunction.

First is the importance of the jury's finding that Rimini Street's infringement was innocent. We respectfully submit, Your Honor, that this finding, in the unique circumstances of this case, precludes the imposition of an injunction. It would be an abuse of discretion, in other words, to do what Oracle is asking the Court to do.

Second, Your Honor, I'd like to discuss each of the four traditional factors from *eBay*. And I'll explain why none of them supports Oracle's request for an injunction.

And the third category, which is what Mr. Hixson spent most of his time on, is the scope of the injunction. Mr. Hixson's argument proceeded from the assumption that an injunction was issued and we were here to debate the scope of it. I suggest, Your Honor, that gets it backwards. I think we should discuss first whether an injunction can and should issue at all. And we say no.

And act of copyright infringement is like a

trespass except the property's intangible. And an injunction is an order prohibiting further trespasses on that property. That's injunctions 101.

And just like a landowner can sometimes get a court order prohibiting a person from walking across his yard, sometimes a copyright owner can get an injunction prohibiting additional copies. But also like that landowner, there are some things that will stand in the way of a copyright owner getting an injunction.

One of those barriers to injunctive relief, Your Honor, is the premise that innocent conduct can't be enjoined. If the trespasser in our example reasonably believed that he had a right to be on the property, he thought it was his own yard or a public park or whatever, then the courts are not going to issue an injunction against him. They're just not. The courts will rightly assume that clarification of the boundary of the property will be sufficient to deter future violations of the property right. The Supreme Court has said that in many cases, Your Honor.

Now, in this case, as the Court will undoubtedly recall, Oracle took the position that Rimini Street was, in our example, a deliberate and intentional trespasser. Their theory was that Rimini Street willfully infringed the copyrights.

Rimini Street's position was quite different, of course. And you heard more about that this morning, by the way, from Mr. Pocker and Mr. Hixson.

Rimini Street at trial took the position that it was an innocent infringement, that it was trying to comply with the law, and the licenses and the software support that it was providing was permitted under those licenses and that any violations were inadvertent, it was an innocent trespasser.

The parties presented these competing narratives at the trial, the Court will recall well.

And the jury decided that Rimini Street was right on this point. And on this point, Your Honor, there is no ambiguity. We put that up on the slide.

The Court gave jury Instruction No. 35: An infringement is considered innocent when the defendant has proved by a preponderance of the evidence that it was not aware and had no reason to believe that its acts constituted an infringement of the copyright.

And then the jury in question 9 was asked: Do you find that the Defendant Rimini Street has proven by a preponderance of the evidence that its infringement, if any, was innocent as explained in that instruction?

And the jury answered "yes" with respect to each and every software product at issue.

Mr. Pocker mentioned an inference from the verdict. There's no inference at issue here, Your Honor. This is an express factual finding by the jury of citizens who heard this case that Rimini Street did not know and had no reason to know that its acts were infringing.

Oracle's motion for a permanent injunction never mentions the innocent infringement finding. It's not in there. We pointed this out in our opposition. And we argued that the jury's innocent infringement finding should not only weigh heavily in the *eBay* factors but actually preclude an injunction altogether under the unique circumstances of this case.

Oracle addressed the jury's innocence finding for the first time in its reply brief at page 12 where it made three arguments, which I've summarized on slide 6.

This morning and this afternoon my colleagues at the other table have made four additional arguments, and I'm happy to address those as well.

Let me talk about their new arguments first, which don't appear in their briefs.

First -- in their injunction briefs. Mr. Pocker said that this is an advisory verdict. That's not true, Your Honor. Innocence and willfulness was submitted to the jury by the Court at Oracle's request as essential predicates to the statutory damages request which they are

entitled to elect any time before final judgment. There is nothing advisory about this verdict. And it was put in -- the jury was asked this question at Oracle's request.

Second, Mr. Pocker said the hacking claims show that the jury found intentional conduct. We can talk about those later, if you'd like, but certainly for the copyright claims that's not true. And the injunction we're talking about here would have to be justified under the Copyright Act, where the only finding of infringement was innocent.

Mr. Hixson then said two additional arguments that aren't in the injunction papers. First, he said we're talking here about prospective infringement and any future infringement will be intentional. And I will talk about that in the context of the *Rimini II* case. There's no evidence of that, and it's wrong for a variety of reasons.

And then, fourth, he mentioned the voluntary cessation cases which I'll also address.

As to the arguments they actually do make in their papers, they make three arguments, Your Honor.

First, that Rimini Street's past infringement was not innocent at all.

Second, that their current -- that our current infringement is willful. That's the argument that Mr. Hixson expanded on.

And, third, they say courts, quote, can and do

enjoin innocent infringers.

They're quite wrong.

Now, Mr. Pocker this morning accused Rimini Street of, quote, wrapping ourselves in the Seventh Amendment. I plead guilty. It's true. We embraced the Constitution of the United States, Your Honor. And we submit that it precludes Oracle's arguments that are contrary to the jury's verdict.

This Court is precluded from reexamining the facts found by the jury. One of those facts is that Rimini Street did not know or have reason to know that the acts were infringing. All of these arguments about lies and this and that, they're just rearguing. You heard that all in the closing argument, and the jury didn't buy it; in fact, the jury rejected it. And they can't come here on an injunction motion and ask this Court to do what the jury didn't do. The Seventh Amendment says exactly that.

Your Honor, we all know what Oracle's litigating position was. It was no surprise. We heard the trial. But they lost that point. Their continued disagreement with that verdict, Your Honor, we submit demonstrates a profound disturbing lack of respect for the jury system.

A panel of 10 citizens sat in the box in Las Vegas, heard these arguments, heard the evidence, and decided that Oracle was wrong and Rimini Street was right.

That finding was not advisory. It binds the Court for purposes of this equitable proceeding. Oracle's motion is simply at war with the verdict.

For the purposes of this motion, the jury's verdict conclusively establishes that Rimini Street's acts were innocent; that is, that Rimini Street did not know and did not have reason to know that those acts were unlawful. And the Seventh Amendment precludes the Court from reconsidering that point.

Now, faced perhaps with that fact, Oracle spent much time talking about the current processes and accusing us of willful infringement today.

Your Honor, some background is helpful to understand this argument.

First, there's no secret about what happened. Rimini Street believed in good faith that its past practices were consistent with the licenses and the law. This lawsuit ensued and the Court issued a summary judgment ruling construing those licenses, disagreeing with Rimini Street's position.

We respect that opinion, Your Honor. After that opinion came out, Rimini Street embarked on an extensive exercise, spent millions of dollars to reconfigure its processes, to comply with the licenses as construed by this Court and the Copyright Act as being litigated in this

case.

Rimini Street then so sure, or at least to cert- -- to ascertain clarity, filed the second lawsuit, brought a declaratory judgment action asking this Court to make a determination whether those second set of processes complied, as Rimini Street has always tried to comply with the licenses and the law.

It was Oracle, Your Honor, that strenuously and successfully kept all evidence and even mention of the current practices out of this lawsuit, the lawsuit in which this injunction is being sought.

Oracle opposed discovery into the current practices. Oracle opposed consolidation of the two actions. Oracle moved in limine to preclude any mention of the current practices at trial, and this Court granted that action. And Oracle opposed Rimini Street's motion for reconsideration of that.

So the trial of this case, the record of this case contains no evidence of the current practices because Oracle insisted that they be kept out. Oracle convinced this Court, in other words -- and this is a direct quote from one of its papers filed in this court, and we put the citations on slide 8 -- to limit *Rimini I* to Rimini Street's past practices, while issues related to Rimini's 2014 and later conduct will get a full hearing in

Rimini II.

That was Oracle's choice. This Court accepted it. We respect it. But it means there's two cases, Your Honor.

And it also means that Oracle's motion, its motion for a permanent injunction in case *I* cites not one shred of evidence regarding the current processes. Not one declaration, not one deposition, not one document, not one email, nothing.

I submit, Your Honor, this Court has rarely seen a motion for permanent injunction that's not supported by evidence on something that a party has the burden of proof on. And certainly as to current practices, Oracle has none.

And meanwhile Rimini Street, of course, has no burden of proof. We are the responding party in this motion. But we came forward with evidence. We put in five declarations, five sworn declarations from the employees in charge of servicing the various product lines which attest that the current practices do not include the acts that were accused and adjudicated in the first case.

What does Oracle have to say about that evidence, Your Honor? What did Mr. Hixson say today? Nothing. He didn't mention it. He doesn't dispute it. In their reply brief they don't mention it. They don't

dispute it. They just pretend that it doesn't exist.

But when the party of the burden of proof has no evidence and the responding party puts in uncontradicted evidence that the current practices don't infringe, the only thing this Court can conclude, we submit, is that the moving party has not carried its burden.

To be clear, Judge Hicks, we are not asking the Court to rule in this motion on the lawfulness of the current practices. That is *Rimini II* under the orders this Court has already entered.

But to be clear, as well, this Court could not rule for Oracle on this point because it has no evidence and because the only evidence in the record is the contrary.

All of it, in other words, should be deferred to the second case.

Your Honor, Oracle's third and final response to the innocent infringement finding is a generic assertion that courts, quote, can and do enjoin innocent infringers. Can and do.

For the proposition that courts can enjoin innocent infringers, Oracle cites a provision of the Copyright Act, Section 405(b), which sets forth a special rule regarding notices and applies only to, quote, copies publicly distributed by authority of the copyright owner

before the effective date of the Berne Convention Implementation Act of 1988, end quote.

Suffice it to say, Your Honor, that none of the works at issue in this case are subject to that provision, and Oracle doesn't dispute that.

And, more importantly, the fact that Congress in this one, you know, oddball unique provision of the Copyright Act expressly authorized an injunction against those innocent infringers involving notices just reenforces the background rule that injunctions are not available in the ordinary case in this case against innocent infringers. In other words, Congress had to codify an exception. So Oracle's own authority actually proves our point.

Second, Your Honor, for the proposition that courts do enjoin innocent infringers, Oracle cites a single district court case, the *Jackson* case from the Northern District of Illinois in 1988.

That case involved a preliminary injunction, not a permanent injunction. There had been no trial and no adjudication of innocence. So that case is not authority at all.

The reality, Judge Hicks, is that no court has ever entered a permanent injunction under the Copyright Act against a person adjudicated to have been an innocent infringer.

You heard this morning about the $58 million in attorney's fees that Oracle has racked up. I think the Court can rest assured that the army of lawyers employed by Oracle looked long and hard for a case enjoining an innocent infringer. They didn't find any. We didn't either, Your Honor. There are no such cases.

In other words, Oracle is asking this Court to become the first in the history of the republic, the first since the first copyright statute was enacted by the first Congress in 1790, to enjoin an innocent infringer.

Now, Mr. Hixson referred to the chief justice's concurrence in *eBay*. And I think it's an excellent place for the Court to look, both that concurrence and the majority, and, for that matter, Justice Kennedy's concurrence. Because all of them stress the importance of historical practice in applying permanent injunctions in intellectual property cases.

And what the Supreme Court said in so many words in the majority opinion, which, of course, is binding on this Court, that equity practice generally, in the issuance of permanent injunctions in particular, is not a good place for judicial innovation. The whole point of adhering to historical practice is not to break new ground.

Your Honor, in fact, the *eBay* case -- it's interesting that Mr. Hixson brought it up. I went back and

looked at the briefs in *eBay*, and Oracle joined a brief in that case, a very interesting brief, which argued that injunctions should not issue against, quote, inadvertent infringers because, as this brief explained, quote, the intent of a wrongdoer has always been relevant to determining a just and equitable remedy, end quote. And we pause there.

Of course that makes sense. A willful infringer more likely to need an injunction, innocent, not likely or maybe no injunction at all. And that has to be the rule.

This brief, Your Honor, went on to say, I'm quoting again, injunctions against innocent infringers frequently impose burdens on inadvertent infringers far out of proportion to the harm done to the rights holder, end quote.

And those are all from the brief for the American Innovators Alliance, a group Oracle was a member, at pages 21 and 22, Your Honor. Oracle was right, we submit, a decade ago when it said that to the Supreme Court, and it's wrong today when it's representing the opposite to you.

The truth, Judge Hicks, is that the equitable power of injunction has always been used to deter, not to punish. The Supreme Court said that in the *Hecht Co.* and many others.

And the deterrence of the remedial rationale of an injunction does not apply to an innocent infringer who does not know or have reason to know that what it was doing was unlawful.

As I said before, judicial clarification of the property rights for such a person is alone sufficient to ensure future compliance. Certainly an innocent infringer doesn't need to be deterred when it changed its practices following that judicial clarification to respect those boundaries as determined by the Court, which is what Rimini Street did here.

In the unique circumstances of this case, in short, we submit that the finding of an innocent infringement by the jury, the fact that Rimini Street did not know or have reason to know that its infringing acts were unlawful, precludes injunctive relief. It's a silver bullet, we submit.

Now, if that's not the case, if that doesn't end it, at the very least the innocence finding and the unique factors that I described and the absence of any precedent in this context must surely weigh heavily in the equitable balance under *eBay* as we explained in our opposition brief. And I'll try to explain that as well.

Of course, Your Honor, *eBay* adopts the four-factor test. Oracle bears the burden of proof. And we

submit they haven't carried it. Irreparable injury, adequacy of damages, balance of hardships, and the public interest.

Your Honor, the first *eBay* factor, and I think in this case one of the two most important, on that I do agree with Mr. Hixson, is irreparable injury.

Now, it's worth pausing here to consider that the trial involved acts of infringement that occurred years ago, as Mr. Hixson said at the end of his argument, six and a half years or something. It's rather odd for Oracle to be asserting today that it's suffering an irreparable injury that requires a prospective injunction, since it never moved for a TRO or a preliminary injunction or any other equitable relief until after it learned that it hadn't persuaded the jury on its -- most of its theories. This injunction action, in other words, is an afterthought, not the main event.

But in any event, Oracle asserts in its motion that harm to business reputation and goodwill can be irreparable. In fact, that's the only harm it asserts in its motion.

Today Mr. Hixson said two additional harms are being suffered. One is the right to exclude. He said that three times in his oral presentation. They say that no times in their briefs. It sort of doesn't matter. All

rights holders have the right to exclude. If that's an irreparable injury, then you would be in the automatic injunction world that *eBay* rejected. So that's just another way that they're disagreeing with the Supreme Court.

His second argument today was a continued infringement theory, that they're being irreparably injured by continued infringement. But as I just explained, they have absolutely no proof of continued infringement and so that goes by the by.

So back to what they do argue in their papers: Reputation and goodwill.

Now, it is absolutely true that at some level of generality harm to reputation and goodwill can be an irreparable injury. And cases like *Douglas Dynamics* say that. Of course cases like *Douglas Dynamics* involve cases to general reputation in the marketplace and corporate goodwill, which is not what Oracle is arguing here. They're arguing a much more limited sort, a much more specific kind of harm that pertains only to their goodwill among support customers.

That's not me saying that, that's them saying that. In their motion at page 16, they say that in so many words. Quote, Rimini undermines Oracle's customer relationships and harms Oracle's goodwill with its

customers.

And they repeat that in its reply brief on page 7: Rimini's infringement damaged the bonds between Oracle and its customers.

Okay. That's the only harm that Oracle claimed in its briefs to be irreparable. Oracle failed to prove that harm. You know, this is an absolutely essential point, Your Honor. It's the lynchpin of their motion for a permanent injunction. But they don't have legally sufficient evidence to support it.

On slide 16 we have identified every page and line in which Oracle has cited evidence in support of its irreparable injury argument. We put that there for the Court because we urge the Court, and we know it will, review it carefully. We're not afraid of it. Because when the Court reviews it, you will find some very interesting things.

First, Oracle cites no testimony from actual customers. Remember their theory of harm is that Rimini Street has damaged the goodwill among customers. But they cite no customer evidence.

This is very unlike, then, the *Apple versus Psystar* case that Mr. Hixson mentioned and which Oracle places principal reliance. In that case the rights holder had come forward with actual customer testimony of

confusion, disparagement, and dismay.

There was no such evidence in this case. In fact, not a single customer came to Las Vegas and testified for Oracle. That says a lot right there about this theory of irreparable harm.

Second, aside from no customer evidence, Oracle cites no survey or other expert evidence that would indirectly examine customer reactions. Usually in a case like this, where the rights holder is complaining of a damaged reputation or goodwill, a survey expert will go out and canvass the customers to determine their attitudes towards the infringer and the rights holder and so forth.

Oracle doesn't have any of that evidence in here. In other words, it has no direct evidence and no indirect evidence of how customers respond. And that is absolutely fatal to its claim of loss of customer goodwill, which is the only irreparable injury it asserts here.

Now, Oracle made all our lives somewhat easier in the reply brief at page 7 when it makes the point that compelling proof, compelling proof, it says, of the irreparable harm is afforded by Ms. Catz, Mr. Yourdon, and Ms. Dean. Great. We can focus on that.

In the next two slides, Your Honor, we've put all of that testimony that Oracle puts, you know, basically all its stock in. And here it is. What did Ms. Catz have

to say? She was the CEO as the Court knows. And because Rimini Street offers support services half off, it really breaks the bonds and trust that we have with our customers.

You heard Mr. Hixson repeat that today. This is the key evidence they rely on in support of its irreparable injury theory. But it doesn't establish irreparable harm, Your Honor.

Oracle admitted at trial Rimini Street is allowed to provide third-party support. And customers, software customers, are allowed to contract with third-party support providers.

Competition, in other words, the availability of a lower priced alternative, cannot be the irreparable harm of which Oracle complains because that is not unlawful. The only thing that was adjudged at trial was not competition were Rimini Street's existence in the marketplace, but rather the technical acts of copying in the past practices about which Oracle complained.

Oracle doesn't have any evidence that those technical acts of copying caused any lack of customer goodwill. There is no such evidence in the record.

The other two snippets -- and, by the way, out of a 4,000-page trial transcript, Oracle came up with three pages to present on irreparable harm -- are from the expert witnesses Yourdon and Dean.

Oracle says they corroborate Ms. Catz' testimony. Your Honor, an expert witness cannot corroborate the facts, okay? Either the facts exist or they don't. And these experts did not offer any expert opinions on customer goodwill or reputation, the subject of irreparable harm. So they're absolutely irrelevant to this portion of this legal proceeding.

And more importantly, perhaps, than all of that is that all of this evidence, Ms. Catz' testimony, Mr. Yourdon's testimony Ms. Dean's testimony, and, for that matter, all of the other evidence cited in Oracle's papers was presented to the jury at trial. And it was all presented in connection with the theory that Rimini Street had built a business based on infringement and was using it to steal customers away from Oracle.

You heard Mr. Hixson just quote almost verbatim from Mr. Isaacson's closing argument on that earlier today. The jury heard all of that too, all the argument and all the evidence. And the jury rejected each and every one of those claims, Your Honor. The jury rejected the lost profits theory. It said that Oracle sustained no lost profits with respect to this copyright infringement.

What does Oracle say about that? In the reply brief at page 8, footnote 4, they say, well, that was just an advisory verdict. Okay. It was. We'll give them that

one. Unlike the innocence verdict.

But Oracle doesn't explain why the Court shouldn't follow the jury's advice. I mean, the whole point of an advisory verdict is to give guidance to the Court in the equitable proceeding. And here we are in the equitable proceeding, the jury found no lost profits. The Court should be guided by that jury -- that verdict.

Oracle failed to persuade the jury on this point. It now has to persuade the Court. But it doesn't have any additional evidence. Once again, its arguments in this proceeding are at war with the jury verdict.

And more importantly, I think, Your Honor, even setting aside lost profits, because we agree that was an advisory verdict, Oracle also accused Rimini Street of inducing customers to breach their contracts with Oracle and of intentionally interfering with Oracle's customer relationships. These were the tort causes of action that went directly at customer goodwill and reputation, the irreparable harm now being claimed. And the jury found for Rimini Street on those claims.

Those findings, Your Honor, are not advisory. Those findings are binding on this Court for this equitable proceeding.

What does Oracle have to say about those? Well, it doesn't say anything in its motion, it doesn't say

anything in the reply brief, and it didn't say anything earlier today. So I guess we'll learn from Mr. Hixson for the first time in rebuttal what -- Oracle's position on that.

Our position is clear. Here is yet another example of Oracle asking this Court to ignore the jury verdict and do something that the jury declined to do.

In other words, Your Honor, we submit that the Court could not accept Oracle's theory of irreparable harm without reexamining the jury's verdict and violating the Seventh Amendment to the United States Constitution. Even if it could, Oracle has offered zero evidence that the jury didn't already consider and reject in connection with very similar claims of harm.

And even if this Court could start on a blank slate, we submit that the miniscule amounts of evidence, essentially one sentence from Safra Catz, does not constitute legally sufficient evidence to support a finding of irreparable injury.

For those three reasons Oracle's motion for permanent injunction doesn't even get past the starting gate.

Oracle's irreparable harm fails for a second and independent reason, which is the causal nexus requirement, something Mr. Hixson didn't talk about earlier.

The Federal Circuit, in an important series of cases, has clarified that part of the irreparable harm requirement is the showing by the rights holder of a causal nexus between the actual acts of infringement and the irreparable harm claimed at the injunction stage. Those were all cases involving *Apple versus Samsung*. It was a series of three cases that build among one another. We cited them all in our briefs.

And just for the Court's convenience, I put some key quotes and citations on page 20.

Oracle doesn't dispute that this requirement applies to injunctions under the Copyright Act. Its only argument, and Mr. Hixson did hint at this, is that the jury's damages award indicates that Rimini Street caused harm to Oracle.

That's not enough, however, to satisfy the causal nexus requirement, Your Honor. In every permanent injunction case that is after a liability verdict, you have to make an additional showing -- it's not just the causation of liability, otherwise you would be in the world of the automatic injunction that *eBay* rejected.

In fact, the last *Apple versus Samsung* case, the 2013 decision, involved a liability determination of infringement where the exact same argument that Oracle is now making was made by the rights holder and the Federal

Circuit said, no, the causation at the liability stage is different than at the permanent injunction stage and the rights holder has the additional burden of showing that the specific infringing acts directly caused the irreparable harm being complained of.

That's a burden that Oracle doesn't dispute that it has and that it indisputably has not discharged. That reason alone is sufficient.

And if we go back to the trial evidence, which is all that we have at this motion, Your Honor, the trial record actually establishes the absence of a causal nexus.

As the Court may recall, about 5 percent of Oracle's support customers leave each year. The Court heard testimony regarding a couple of them, Pitney Bowes and Bausch and Lomb, which left Oracle for reasons having with nothing to do with Rimini Street.

Oracle's own expert witness, Mr. Yourdon, agreed that Rimini Street's customers come from this 5 percent. And that alone, that evidence, Your Honor, is sufficient to break the causal chain between the technical acts of copying from the innocent infringement verdict and the harm now identified by Oracle as irreparable. For that reason too no irreparable injury can be shown.

Now, Judge Hicks, the second *eBay* factor is the adequacy of legal relief, of damages. Here it's Oracle's

burden to show that damages not only would not but could not provide full recompense for the injuries it complains of.

The jury, of course, found as a factual matter $35.6 million in damages, a fair market value license, was sufficient to cover, quote, the entire scope of the infringement. That's what this Court charged the jury in Instruction No. 33. The entire scope of the infringement is covered by $35.6 million in damages.

That award fully compensates Oracle for past infringement, and, as I've already discussed, there's no evidence in this record of future infringement. $35.6 million it is.

And how did we get there, Your Honor? In question 6, the jury determined that the fair market value license rather than lost profits was the best measure of Oracle's damages. It was given an either/or choice.

And then in question 7 it identified the amount of that license, 35.6 million.

And the associated Jury Instruction No. 33 made clear that this was an objective measure of damages that, quote, is meant to approximate the fair market value of the license for all of the copyrights Rimini Street infringed.

Why is that important, Your Honor? Oracle admits in its motion at page 20, footnote 1, that its

requested injunction is limited to acts that have already been determined to infringe.

I'm going to return to the importance of this footnote 1. But for now let's just look at that quote.

"Oracle asks the Court for a permanent injunction restraining Rimini from continuing to commit the infringement that this Court and the jury have already determined to be copyright infringement."

Those same acts are the subject of the license awarded by the jury. The license is coterminous, coextensive. It maps exactly to the requested injunction.

Your Honor, Oracle can't double dip. It can't get a license payment and an injunction for the same conduct. It's yet another way of saying that the legal remedy afforded to Oracle under the Copyright Act is adequate recompense for any harm suffered.

What does Oracle have to say in response to this? In its papers it mentions the license award only once, once again in its reply brief, so this is our first time to respond to their arguments. Its objection is that, quote, Rimini fails even to articulate how the jury's award quantifies or compensates for the harm to Oracle's goodwill and reputation.

Now, first if the Court agrees that there's no

evidence to harm and goodwill and reputation, this is a moot point. So there's that logical difficulty with their argument.

Second, it's important to note what Oracle doesn't say. Oracle doesn't dispute that a lost profits award would have provided full compensation. In fact that's what it sought. Its primary request for relief was lost profits. And if the jury had awarded lost profits, it would have been made whole.

That point, Your Honor, kills their adequacy of damages argument. Because the question is not whether the legal relief awarded is adequate but whether the legal relief available is adequate. In other words, Oracle's inability and failure to prove lost profits doesn't remove the point that the lost profits award would have been sufficient had they had enough evidence of it, had it actually happened.

You know, otherwise anybody that can't muster up enough evidence to secure lost profits comes back for a second bite at the apple at the injunction stage. The law is contrary. In fact, once again, Oracle's request is simply another request for this Court to reconsider the jury's verdict.

And even setting aside the failure to prove lost profits, Oracle ignores the nature of the fair market value

license award that the jury did award.

The only proof of harm to Oracle's customer relationships at trial that matters that Oracle relies on now is Ms. Catz' testimony. But the jury heard that testimony, and they were fully capable of factoring it into the hypothetical license negotiation.

A rights holder after all, Your Honor, concerned that its competitor will use the license works to compete, will factor that point into its royalty demand for those works.

In other words, in the hypothetical negotiation Oracle would have taken into account any impact to customer relationships. And the jury instruction specifically told the jury, quote, you should consider all of the information known to and all of the expectations of the parties. Certainly Ms. Catz' view was among those things.

Today Mr. Hixson argued for the first time that this point didn't appear in Oracle's expert reports. So what? It was Oracle's burden of proof. What it chose to put in its expert reports or not doesn't matter. The point is the jury heard this testimony and was able to evaluate the license and determine whether -- what the value of it was and so forth.

If Oracle is right, by the way, the jury's damages award provides the requisite causal nexus between

infringement and goodwill, then it can't deny that the same award fully compensates Oracle for that harm.

In other words, if they're going to rely on the jury verdict to establish causation, then they've just shot themselves in the foot on the second *eBay* factor.

The third *eBay* factor is the balance of hardships. It requires the Court to weigh the competing interest of the parties, whether Oracle would suffer harm in the absence of an injunction and whether Rimini Street would be harmed by the issuance of an injunction.

Oracle, we submit, would not suffer any harm if the Court were to deny the injunction motion. These two companies have now competed for 10 years. They're parties to two lawsuits related to that competition. The legal system can resolve this dispute through damages without the distorting effects of an injunction.

Rimini Street in contrast could suffer significant harm to its current business practices if the proposed injunction were entered. It's a small company with fewer resources than Oracle, and then vague and overbroad injunction proposed by Oracle appears designed to prevent current processes, even though Oracle fought to keep those processes out of this litigation and they are actively being litigated in *Rimini II*.

Now, Oracle's principal response to this, Your

Honor, and you heard it today from both Mr. Pocker and Mr. Hixson, is that if the current processes don't infringe then Rimini Street won't be harmed by an injunction and Rimini Street's very resistance to an injunction, the fact that I'm standing at this podium today, must mean -- it must be an admission that we continue to infringe. Mr. Hixson used the word admission five times in his argument.

It's not an admission, Your Honor. In fact, what it is is one of the classical logical fallacies. Formally it's known as the either/or fallacy or the fallacy of the excluded middle. The structure of this fallacious reasoning is that it assumes a binary outcome, an either/or outcome, when in fact there is at least a third option. A third option is present here, and it's one that Oracle simply refuses to acknowledge.

The third option, Your Honor, is that the proposed injunction is not limited to past practices adjudicated in *Rimini I* but in fact would improperly extend beyond the verdict in this case to reach noninfringing current conduct.

Rimini Street is resisting the injunction not because it continues to engage in the practices adjudicated in *Rimini I* but because Oracle is trying to prevent it from engaging in noninfringing conduct, the very conduct that is

issue in *Rimini II*.

The Supreme Court spoke to this very problem in the *NLRB* case that we cited in our opposition on page 22. And this is a quote that bears keeping in mind.

"The mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."

But that's exactly the game that Oracle is trying to play here. Mr. Pocker said so in so many words this morning, Your Honor. He said that Oracle wants to come in and hold Rimini Street in contempt for what he called borderline infringement. Borderline infringement. I don't even know what borderline infringement is.

But if this Court were to enter that injunction, it doesn't stop there. Oracle's going to come in here with contempt motion after contempt motion because they're going to use every weapon in the litigation arsenal. Not because Rimini Street will be violating the injunction but because they are using the litigation process as a tool to exert pressure on a competitor.

Your Honor, this is an important point because the scope of the injunction. And I'd like to address that a little bit more in a minute.

The final *eBay* factor is the public interest. No injunction should issue if it would have adverse effects on persons not represented in this courtroom today.

On the public at large, Your Honor, is the public better off with one provider of support services for enterprise software or two?

The question answers itself. The interest of competition and consumer choice are -- clearly favor multiple participants in the marketplace. This Court should take that into account in declining Oracle's request for equitable relief.

Rimini Street's customers should be considered as well. Hundreds of corporations, schools, hospitals, and governments have contracted with Rimini Street to provide enterprise software support. And the Court heard at trial that these customers are pleased with Rimini Street's services. This Court should not enter an injunction that might disrupt their business operations.

Now, our position is that no injunction whatsoever should be entered on this record for all the reasons I've just explained. But if the Court were to enter an injunction, it should not simply adopt Oracle's

proposed order. It fails to comply with Rule 65 in a number of important respects.

At the outset the facts recited in that order are incomplete and erroneous. We've put forth specific objections in the appendix to our brief, and the Court would have to resolve those disputes.

On the merits Oracle's proposed injunction contains a number of provisions that go far beyond the conduct actually adjudicated in *Rimini I*, and that can only be explained as an effort on Oracle's part to prejudge the issues in *Rimini II*, the very issues that Oracle insisted be kept out of this litigation.

We've listed the five most problematic, Your Honor, on slide 34, and they're explained in detail in our opposition brief at pages 20 to 25. I'm not going to go through them one by one because Oracle has the same answer to all of them.

Oracle says they all -- at least that these blanket prohibitions all involve terms that were defined by the Court or used in the litigation. And that's true. Oracle's problem or what Oracle doesn't acknowledge is that Oracle's proposed injunction makes no effort to limit those terms to the context in which they are used. And the Court is well aware from many context that terms have meaning only in context.

Oracle seeks a blanket prohibition that's designed to capture and prevent and prohibit and subject to contempt proceedings Rimini Street's current processes without waiting for the second lawsuit. Let me just give you one example, Your Honor.

Oracle's proposed injunction would appear to prohibit Rimini Street from using cloud-based servers to provide support services to its customers, even though there is absolutely no doubt that cloud computing played no role whatsoever in *Rimini I*.

We pointed this out in our opposition. We said that's an example of where the injunction is just too broad and goes beyond adjudicated conduct.

Oracle's only response, only response, Your Honor, is at page 4 of its reply brief, which is, "The pendency of *Rimini II* is not a get-out-of-jail-free card." "The pendency of *Rimini II* is not a get-out-of-jail-free card."

In other words, Oracle doesn't dispute our showing that the proposed injunction would reach cloud computing, that cloud computing was not at issue in *Rimini I*, that cloud computing is at issue in *Rimini II*, and that therefore -- and then our point was, therefore, the injunction clearly can't reach it. And Oracle's answer is, "The pendency of *Rimini II* is not a get-out-of-jail-free

card."

That's not responsive, Your Honor. Oracle's trying to get a leg up in *Rimini II*, and this Court should not assist in that exercise.

Another example Mr. Hixson brought up today --

THE COURT: Mr. Perry, I want to caution you, you've hit your 45 minutes. So please wind it down.

MR. PERRY: And, Your Honor, I will wind it down.

The simplest answer, Your Honor, is the most equitable. Oracle's motion for a permanent injunction should simply be denied. It should be denied because the motion -- the finding of innocent infringement precludes an injunction in the circumstance of this case. It should be denied because Oracle hasn't proven the *eBay* factors. It should be denied because the proposed injunction doesn't comply with Rule 65.

Oracle had a full and fair opportunity to challenge Rimini Street's past practices at trial. The jury concluded that the infringement was innocent and that the $35.6 million fair market value award was sufficient.

Oracle's request for a permanent injunction is inconsistent with that verdict, unsupported by the facts, and contrary to principles of equity. The motion should be denied.

THE COURT: All right.

MR. PERRY: Thank you.

THE COURT: Thank you.

Let's see. We probably should take a short break before we turn to Oracle's reply argument. Let's take approximately 10 minutes and reconvene at that time.

Madam Clerk, let me know when everyone's ready to go.

COURTROOM ADMINISTRATOR: Yes, Your Honor.

Please rise.

(Recess from 2:38 p.m. until 2:51 p.m.)

THE COURT: Have a seat, please.

The record will show that we're reconvened after an afternoon break.

And, Mr. Hixson, it's your opportunity to present Oracle's reply argument.

MR. HIXSON: Thank you, Your Honor.

I began this afternoon by talking about the right to exclude and Oracle's exclusive rights under Section 106 of the Copyright Act. And so I'll begin reply arguments on there as well.

And I thought that opposing counsel offered a useful analogy when he talked about a landowner, physical land, as opposed to an intangible property right, like a copyright, and he talked about a trespasser who comes on to

the land and may have to pay damages for a trespass.

This illustrates why an injunction is necessary to protect Oracle's right to exclude. If somebody trespasses and trespasses again and they just have to pay dollar amounts to measure those past trespasses, that doesn't protect your right, as the landowner, to say, "Get off my land."

That's the order we are seeking here, that they have trespassed again and again against Oracle's copyrights. And what we want is an order from this Court to say, "Get out of our property." This is ours. It's not Rimini's. And I think the analogy to the land illustrates why injunctive relief is so important in protecting the right to exclude.

Now, opposing counsel did accuse us of raising a new argument today. But he's saying that the right to exclude wasn't in our papers.

But it was. It was on page 17 of our motion where we talked about the right to exclude. And I quoted in the paper the exact same quotation we had today from the *Douglas Dynamics* case in the Federal Circuit saying where two companies are in competition against one another, the patentee suffers the harm, often irreparable, of being forced to compete against products that incorporate and infringe its own patented invention.

And that's what I began with today about Oracle's own -- forcing to be with its own software. And the only way that can be remedied is by an order from this Court enforcing Oracle's right to exclude.

This also explains why no matter how opposing counsel phrases it a damages award and an injunction are not double dipping. Because your instructions to the jury that they consider all infringements meant all infringements that had happened.

But an injunction, if the Court issues one, is for future conduct. It reaches forward to future infringements that hadn't occurred as of the time of the trial. Damages are necessarily backwards looking, so an injunction isn't double dipping, and it necessarily can't be compensated for any kind of damages award.

Second, I'd like to turn to the other type of irreparable harm, which is that the continued infringement and the threat of continued infringement.

I don't know why Rimini finds it so interesting that we objected and kept out of trial their new 2.0 processes. Of course we did. We hadn't had any discovery about that, and that was just an attempt to sandbag us in front of the jury.

But that doesn't mean that you can't read Rimini's opposition brief, which is all that we're asking

you to do. We're not asking you to make factual findings in case number *II* about what did or did not happen. We're asking you to read the brief that Rimini Street filed and to look at that and to see if you can -- are confident that there's no more infringement going on by Rimini.

And Rimini says on page 2 of their opposition, "If the Court enters the proposed injunction, Rimini could suffer significant harm to its lawful business and to its ability to litigate contested conduct in the second action still pending in this Court."

They are saying that the injunction we put forward would impact their current processes. If you agree with Oracle that our proposed form of injunction enjoins practices that have already been adjudicated to be unlawful, then that is an admission by Rimini that they are continuing with those practices; they are ongoing.

And Rimini says this multiple times in their opposition brief again and again on pages 20 through 24, specifically on, for example, page 21, where they say our request for an injunction against the distribution of derivative works is yet another attempt to resolve a live issue in *Rimini II*, whether Rimini's creation and distribution of custom code and documentation violates Oracle's intellectual property rights.

Your Honor, this was the trial we had last fall,

where Dr. Davis was on the witness stand and explained about the creation and distribution of the derivative works, the patches and fixes that Rimini was providing.

And again on page 23, where Rimini says, "Perhaps the most striking examples of Oracle's overreach are the proposed injunction's prohibitions on Rimini's use of Oracle's software licensed to one customer in a manner that would benefit any other licensee," this was your first MSJ ruling, where you ruled that Rimini Street couldn't do that with respect to PeopleSoft and then JD Edwards and Siebel.

This was all covered in the jury instructions. This is what Dr. Davis testified to, what Mr. Ravin admitted to on the witness stand. This was the conduct that was adjudicated in the first case and that we're entitled to have an injunction restraining them from committing. And this is what they're saying that injunction would impede their current processes.

So all we're saying is you can read the opposition brief and it should indicate to you, as it indicated to us, that they are continuing to infringe.

And contrary to opposing counsel's statement, this is not a new argument that I'm making here today. It was all over our reply brief. We've said this many times. For example, on page 1 of our reply, we said, "Worse,

Rimini's opposition is strong evidence that Rimini continues to infringe Oracle's copyrights."

So this is not a new argument -- oral argument today, this is something that we laid out in detail in our reply brief.

And so we have both the need to protect Oracle's right to exclude, and we have the ongoing infringement.

But it's also interesting what Rimini Street didn't respond to in their oral argument today. Because I talked about the hypothetical.

What if it were really true that they had stopped infringing in 2014 after your summary judgment order? And I went on in some detail about this, talking about the *MGM v. Grokster* case, the *Disney v. Powell* case, about how when an infringement comes to a halt only after a judicial finding of liability and that doesn't count as voluntary cessation, the courts still see the risk of resuming the infringement the day the lawsuit ends and courts still issue permanent injunctions in those situations.

And we've cited the cases in our papers, and I discussed that earlier today. There was no response from Rimini Street. There was simply nothing about that, nothing addressing the voluntary cessation case law.

And I explained also, and we explained this in

our papers, how courts apply this voluntary cessation case law when defendants claim to be innocent. And I explained how when there's an innocent infringer that immediately stops infringing upon notice that it was doing so, that in that situation courts don't issue permanent injunctions.

And then I explained how this was different, how despite Rimini's claim that they were an innocent infringer, they did not stop when Oracle brought this lawsuit or when Oracle notified them of its claims. They fought for years in discovery and litigation, they fought over summary judgment, and they had an order entered against them, and that that's the kind of situation where courts have repeatedly held that a permanent injunction is necessary.

As to the jury's finding that Rimini's infringement was innocent, that simply has no bearing under *eBay*. It's not one of the *eBay* factors that's discussed. It's largely not discussed in the case law.

It's untrue that it would be somehow unprecedented for the Court to enter an injunction against an innocent infringer. In most cases that's -- the issue of innocent infringement is irrelevant and it doesn't come up. Instead what courts look at is if the defendant stopped was it voluntary cessation or was it after a court found them liable? That's the key factor that courts

distinguish about and show why a permanent injunction is so appropriate here.

The next thing they do is they talk about harm to goodwill, and they talk about evidence that Oracle did not present in this case, that we did not present a customer survey.

We don't need to have a customer survey. Courts don't require that type of evidence in order for a court to make a finding of injury to reputation and goodwill. We addressed this point in our briefs, and I did earlier today, that their -- the *Teller v. Dogge* case in this district found that a declaration could be sufficient to support an injury to goodwill or reputation, and the Tenth Circuit's decision in *Harolds Stores* that the testimony of the plaintiff's executive could be sufficient. And we offered that kind of evidence here.

Opposing counsel put on the screen a couple of slides in which he highlighted a few sentences from Safra Catz's testimony, and then he told the Court that's all the evidence there was in the record about injury to goodwill or reputation.

That's not true, and I would invite the Court to take a look at our proposed facts 87, 88, and 89, where we more comprehensively address the evidence in the record that shows the injury to reputation and goodwill.

It's also not true that the fair market value damage award somehow took account of injury to reputation or goodwill.

Mr. Hampton's analysis said nothing at all and made no attempt to quantify that analysis. He only looked at avoided costs on the Rimini's side, and Ms. Dean's opinion with respect to database again only dealt with license.

So there was no attempt by either side to quantify injury to reputation or goodwill; so there's no basis to think that it was part of the fair market value damages award.

Rimini also argues today that the jury's finding against lost profits implies that the jury found no causation or implies that there was no causal nexus, that supposedly the jury didn't see that Rimini's copyright infringement caused injury or damage to Oracle. That's what they would like you to draw from the verdict on lost profits.

But that's incorrect because of the way the Court instructed the jury on damages.

Your Instruction No. 28 to the jury on copyright damages told them: You must determine Oracle International Corporation's damages resulting from Defendant Rimini Street's copyright infringement. Oracle International

Corporation is entitled to recover either the actual damages suffered as a result of the infringement or statutory damages.

You then explained that, as a measure of actual damages, there are two choices: a fair market value for the license rights or lost profits. But those were both measures of actual damages, and you instructed the jury that they had to find that those damages resulted from infringement, that they found the copyright infringement caused those damages.

And you repeated that in Instruction No. 30, where you said that for Oracle International Corporation to recover actual damages it must prove that the infringement caused damages; that is, that there is a causal relationship between Oracle International Corporation's losses and Rimini Street's infringement.

And the jury took those instructions and they went back in the jury room, and they come up with a $35.6 million actual damages award. That represents a finding that Rimini Street's infringement caused that injury to Oracle. They found the causal nexus. They found the link between the infringement and the harm to Oracle.

Now, it is true that they rejected our lost profits measure of damages, and they didn't explain why. But as we've cited many cases holding, the lost profits are

often very difficult to quantify, and that difficulty in quantification of the lost profits is one reason why this injury to lost profits, to goodwill, to reputation is often deemed an irreparable harm.

But Rimini Street is absolutely wrong in saying that the jury rejected causation or that the jury didn't think the infringement harmed Oracle. The jury did quantify and find causation and harm to Oracle based on Jury Instructions No. 28 and 30. So there was that causation here.

Next Rimini Street quibbles with some of the terms in the proposed injunction that we have, and they identify one dealing with cloud computing. I'm not going to address all the points that they raised in their papers because I addressed some of them earlier today.

But this goes to where we're asking for an injunction that is fully in line with what was litigated. We want an injunction saying that they can only use the software on the customer's own facilities and that for JDE and Siebel it could be at a third party if it's for a backup or archive purposes.

That comes right from this Court's summary judgment orders, docket 474, your February 2014 summary judgment order. You held that, quote, Section 1.1 of the license grants the City of Flint a license to use the

licensed software, solely for the customer's internal data processing operations at its facilities.

You then went on to say that Section 1.2(b)(i) expressly limits copying the licensed software only to the City of Flint's facilities.

And likewise on page 21, you addressed JD Edwards, and on page 24 you addressed Siebel, both saying that the use was restricted to the customers' facilities except for third-party archive and backup copies.

We are asking you for an injunction entering that order, what you already ruled two years ago on summary judgment, consistent with the jury instruction as -- again as well.

I acknowledge that cloud computing is at issue in *Rimini II* and it wasn't at issue in *Rimini I*. But we're entitled to an injunction that codifies what you already ruled. And then in *Rimini II* we can fight with each other whether cloud constitutes the customers' facilities. We don't believe it does. But that's the fight we can have in *Rimini II*.

But the fact that cloud computing might be in *Rimini II* doesn't mean that you should stop and not enter an injunction based on decisions you've already made, conduct that was already adjudicated in *Rimini I*. That's what we're asking you to do, and our proposed injunction

tracks that.

Next Rimini says that there shouldn't be a permanent injunction because we never moved for a preliminary injunction. But that request doesn't make any sense.

Courts have held that whether or not a party seeks a preliminary injunction has nothing to do with a permanent injunction. We've cited the Second Circuit's decision in *Louis Vuitton*, and we cited the *Capitol Records* case in our papers as well.

We moved for a permanent injunction as soon as we were entitled to ask for one, which was after we had prevailed on the merits on a jury trial. We moved as fast as we could. We asked for expedited briefing. We made every effort to seek this permanent injunction.

Undoubtedly if we had moved for a preliminary injunction, Rimini would have opposed on the grounds that there were too many contested facts and we can't do that before the trial. We asked for the relief that we're seeking at the earliest possible opportunity.

And, lastly, I do want to address the disposition question that counsel raised at the start of his remarks.

Section 503(b) does not require only the destruction of infringing materials. It says it can

require the destruction or other reasonable disposition of the infringing materials. One of those dispositions can be turning it over to Oracle, another can being escrowing third party.

But it's not true that 503(b) is a light switch where you have to just simply destroy everything or not do anything at all. It gives the Court discretion in addition to destruction to effectuate another reasonable disposition. And that's what we're asking for.

And as to the suggestion that Rule 65 or the standards governing an injunction somehow reach out and apply to disposition under 503(b), the advisory committee's notes to Rule 65 expressly note that Rule 65(f) only applies to impoundment proceedings under Rule 503(a). There's no authority saying that they apply to Rule 503(b).

And so accordingly, because of these irreparable harms that Oracle faces that its right to exclude not being enforced, because of the ongoing infringement as indicated by Rimini's opposition papers, and hypothetically, even if Rimini had ceased infringing in 2014, the case law saying that when they do that in the face of a finding of liability, that doesn't count, it doesn't stop the irreparable harm, that justifies issuing the injunction in Oracle's favor.

And we have very carefully gone through the

Court's orders and jury instructions to craft a proposed injunction that embodies the terms that the Court has already ruled on and that it is focussed specifically on the conduct that was adjudicated at the trial last fall and that would restrain and enjoin Rimini from repeating that unlawful infringing activity. And so we'd ask that the Court grant that motion.

THE COURT: All right. Thank you, Mr. Hixson.

All right. Thank you, Counsel, very much for your arguments on this. I appreciate them.

I want to compliment counsel on both sides. They've done an excellent job. But I also have to say I appreciate finally hearing from a Nevada lawyer in this case. Mr. Pocker, you did a fine job on behalf of Oracle. And that's not to suggest that anyone didn't do a fine job in this case. I think everyone did.

I will hope to get a decision to you as soon as I can. In the for-what-it's-worth department, I've just had a flood of trials and judicial hearings which have been -- have followed fairly complex evidence and require decisions from the Court which are time-consuming.

And so I have no doubt whatever I issue here is going to be backed up, in part at least, by what I have to do in other cases.

But all of that stated, I certainly recognize

the importance of being able to give you a decision on these matters as soon as reasonably possible. And that's what I will do.

I wish I could give you a timetable, but I really can't, given the complexities that I just mentioned.

So all of that stated, I want to thank you all for being here. I appreciate the obvious interest on both sides. I'm well aware of it, obviously, after five weeks in trial and, what is it now, six years of litigation.

But I will hope to get back to you as soon as I can. Thank you very much.

Court will be in recess.

COURTROOM ADMINISTRATOR: Please rise.

(The proceedings concluded at 3:10 p.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Donna Davidson 5/31/16

Donna Davidson, RDR, CRR, CCR #318 Date
Official Reporter